Supreme Court, U.S.
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No.

IN THE

Supreme Court of the United States

ANTONIA J.H. ELKINS

Petitioner

v.

PHARMACY CORPORATION OF AMERICA, and KEITH ANDERSON

Respondents

On Petition for Writ of Certiorari to the U.S. Court of Appeals for the Fourth Circuit

PETITION FOR WRIT OF CERTIORARI

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Questions Presented for Review

During the relevant time, Petitioner was the single mother of two young children and sole head of her household. She accepted employment with the corporate Respondent upon terms, carefully negotiated by her and acknowledged by the company, which would allow her to perform her job without interfering with her ability to devote time to her young children. The company accepted her terms because her expertise was substantial and her credentials impeccable.

1. Did the U.S. Court of Appeals fulfill its duty to consider the totality of the record *de novo* and in the light most favorable to Petitioner?

2. Should the Court of Appeals have upheld dismissal of Petitioner's hostile environment claim before it even considered the other claims?

3. Was the court correct in assessing Petitioner's "chain of adverse actions" as trivial incidents endemic to employment, or could a fair-minded jury have found in them a course of increasingly severe retaliatory actions culminating in a constructive discharge?

4. Did Defendant PCA meet its responsibility to Petitioner under Title VII , or did it facilitate her discharge?

5. Did the Court of Appeals decide the case in contradiction to its own previous holding in Beardsley v. Webb, 30 F.3d 524 (4th Cir. 1994)?

6. Could a major change in terms and conditions of employment be an ultimate employment decision?

Parties to the Proceeding

The Petitioner is Antonia J.H. Elkins, single mother of two young children.

The Respondents are Pharmacy Corporation of America, Petitioner's employer during the relevant time, and Keith Anderson, Petitioner's supervisor during the relevant time.

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Petition for Writ of Certiorari

The Petitioner, Antonia J.H. Elkins, respectfully prays that this court remand her case to the U.S. District Court for a trial by jury, or in the alternative issue a writ of certiorari to review the July 12, 2000, decision of the United States Court of Appeals for the Fourth Circuit, petition for rehearing *en banc* denied August 18, 2000, which upheld the December 13, 1999, decision of the U.S. District Court for the District of Maryland granting summary judgment in favor of Defendant-Appellees on all of Plaintiff-Appellant's claims.

Opinions Below

The U.S. District Court for the District of Maryland order and opinion, attached as Appendices A and B, respectively.

The U.S. Court of Appeals for the Fourth Circuit order and opinion, attached as Appendix C.

Statement of Jurisdiction

The order of the U.S. Court of Appeals for the Fourth Circuit denying Appellant's petition for rehearing and rehearing *en banc* was filed on August 18, 2000, attached as Appendix D.

Statutory Provisions

Title VII, 42 U.S.C. § 2000e (1994) provides, in relevant part:

Sec. 2000e-2. Unlawful employment practices

(a) Employer practices
It shall be an unlawful employment practice for an employer -

(1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin; ...

and,

"EEOC Sexual Harassment Guidelines," EEOC Notice No. N 915-050, 3/19/90, Policy Guidance on Current Issues of Sexual Harassment, "Guidance," subsections C(1, 2, and 5) and section E(1). Appendix F.

Statement of the Case

Hooters: n. (pl.), coarse slang for a woman's breasts (Oxford Illustrated Dictionary). [This entry was not illustrated.]

Petitioner, Antonia J.H. Elkins (hereinafter "Ms. Elkins") appeals the Fourth Circuit's affirmation of the District Court's order granting summary judgment to

her former employer and supervisor, Pharmacy Corporation of America (hereinafter "PCA") and Keith Anderson (hereinafter "Anderson"), respectively, dismissing her employment discrimination action and associated state law claims as presenting no genuine issue of material fact, and thereby depriving her of a fundamental right, the right to a jury trial, as clearly erroneous. Appendix B, District Court Memorandum.

Ms. Elkins contends that the Fourth Circuit opinion perpetuates an egregious miscarriage of justice: that the District Court judge, in finding Ms. Elkins' evidence insufficient to create a genuine issue of material fact, improperly assumed the fact-finding role the jury should have played; that if she had been believed, there was indeed such an issue, and that she would have prevailed on the law.

Ms. Elkins further argues that in affirming Judge Nickerson's summary dismissal, the Fourth Circuit failed in its duty to consider the summary dismissal *de novo*, and to interpret the available evidence in the light most favorable to Ms. Elkins. Had it done so it must have found Ms. Elkins had presented a classic pattern of retaliation by her supervisor under Title VII guidelines. The court instead assumed the function of the jury, minimized her claims, and arbitrarily ruled that none of the actions by her hostile supervisor rendered her employment so intolerable as to warrant her resignation. In doing so the court violated the intent and spirit of Title VII law and precedent, and failed to enforce it.

That the opinion is unpublished is all the more reason to overturn it, since a succession of such cases could quietly set at naught the Equal Employment Opportunity Commission's guidelines. It is intimidating for a lone and powerless woman (in 1996 still youthful and beautiful, the sole support of two small children aged 8 and 3), in challenging a huge corporation like the Pharmacy Company of America, to continue on when suffering misunderstanding and rejection of her complaint at every turn. It is tempting to give up rather than ask for the attention of a court so beleaguered with requests for certiorari--but no other venue can now help Ms. Elkins. She prays that the case be remanded to the lower court for trial by a jury.

This is in some ways a unique case. Of the several exempt employees at PCA's Beltsville facility, only two of them were women. It is not a case where constant proximity of the supervisor could expose a group of women to constant and gratuitous sexual harassment in accord with the usual paradigm: that sexual harassment must be pervasive. It is a case where one female employee mortally offended her supervisor by denouncing his invitation to "Hooters" - a restaurant blatantly appealing to the prurient interests of "guys" - as sexual harassment, thus forcing the supervisor to forgo a keenly anticipated pleasure when in Richmond at a work-related conference. She thereafter suffered a course of retaliation which led her to resign in order to avoid intolerable work conditions (including potential loss of pay) and /or eventual termination.

It is a case where the emphasis is not on the usual accidents of sexual harassment - but on severe and calculated interference with the performance of Appellant's job duties, and the deprivation of significant employment benefits: autonomy, flexibility, and the ability to earn her pay by working only a reasonable number of fours - the 40-50 hours she originally contracted for on taking the job, as well as deprivation of a reasonable amount of time with her two young boys (one of them not yet in school).

This is an employment discrimination case more than a sexual harassment case. *See* Appendix E, Title VII; Appendix F, EEOC Guidelines. It began with Ms. Elkins's refusal to acquiesce to, or at least *politely* decline, the defendant's attempt, motivated by virtue of Petitioner's gender, to alter the terms and conditions of her employment. *To wit,* he wanted her to accept his violation of the corporate employer's policies against sexual harassment (of which a signed acknowledgement of receipt by Anderson is on file in the corporate records) by meekly accompanying him to what she reasonably believed was but a toned down "titty bar" for dinner. (Petitioner apologizes for the use of such a gross word, but no other word adequately suggests the atmosphere of Hooters. *See* Appendices G, H, and I, which contain materials relating to Hooters restaurant's public self-image, and some views of the public at large.) She refused his invitation to dine at Hooters using very strong words, and called the invitation sexual harassment. Had Petitioner dined at Hooters without protest despite her personal feelings, the terms of her employment would have remained unchanged, and she would not have suffered

retaliation. Had she politely declined the invitation, the terms of her employment would probably have remained unchanged, she would probably not have suffered retaliation. Such is indicated by the lack of action by the defendant against another female co-worker present who made no objection to the invitation to Hooters, at least not to the defendant's face. Ms. Elkins refused the invitation and vigorously complained to her supervisor (Anderson himself, initially, and later to the corporate human resources director) as required by company policy; as a result, her supervisor (again, Anderson) proceeded to methodically change the terms and conditions of her employment in retaliation for her refusal.

Reasons for Granting the Writ

A novel issue presents: whether the course of retaliation suffered by a person who had protested a single instance of sexual harassment was not by its very existence part and parcel of the sexual harassment, even if not overtly sexual in itself, and should have been considered in the determination of whether the harassment was severe or pervasive.

Is retaliation against one employee who protested an incident of sexual harassment insignificant and beyond the reach of Title VII if it is not overtly sexual in itself? How severe and/or prolonged must retaliation be in order to be actionable?

Petitioner's Original Agreement with PCA

In June, 1996 Ms. Elkins accepted a position as I.V. Nurse Consultant for PCA on the basis of a letter outlining the terms and conditions of her employment. Appendix J, offer letter. She had identified her ability to work from home as much as possible because of the age of her youngest child, not yet in school, as the condition of employment, in addition to a salary of $50,000, which would lead her to accept the job. PCA agreed, and supplied her the equipment (a beeper and fax machine) she would need to stay in constant touch with the regional office in Beltsville, Maryland. (Ms. Elkins resides in Reisterstown, Maryland, a 45 minute drive from Beltsville.) [Letter of employment, work hours agreement as appendices] In fact, PCA had no office space for Ms. Elkins at Beltsville. All of her extensive files and work materials were in her home office. PCA also anticipated savings from her working at home, because she was free to manage time more efficiently, leaving directly from home for any one of the 23 nursing homes in a three-state area, plus D.C., for which she was developing courses of instruction in I.V. therapy. Ms. Elkins estimated that she averaged almost 300 miles a week in travel during the weeks she traveled (still almost 200 miles a week even when averaged over her entire period of employment), and she got a mileage allowance of $.31 per mile. Several of her weekly mileage tallies exceeded 400 miles, one even approached 700 miles. Appendix L, analysis of travel vouchers. Baby-sitting was a possible problem in the job, because she was no longer married, yet had to arrange for as many as three overnights when visiting distant homes in Virginia or West Virginia.

Before she was scheduled to begin work on July 8, 1996, Ms. Elkins was notified by PCA of a change of supervisors; however, the company reiterated its offer of employment under the conditions previously worked out. Ms. Elkins established cordial and business-like relations with her new supervisor who promised to honor his predecessor's commitments.

The Triggering Incident

On August 5, 1996, while Ms. Elkins, co-worker Susan Stevens (hereinafter "Stevens"), and her supervisor, Anderson, were in Richmond, Virginia at a conference, Anderson suggested they eat dinner at a "Hooters" restaurant. The appeals court opinion states that Ms. Elkins "rejected the suggestion as inappropriate." Ms. Elkins alleges she did more than that: she alleges that Stevens approached her whispering in disgust, "Oh, you should see him! His wife isn't here and he's all dressed up in chains and jewels, ready to go out, and guess where?... to Hooters!" and that it had nothing to do with wanting chicken wings. Stevens alleges that she relayed Ms. Elkins' "amusing" comments to Anderson in a "joking" context, and that they simply went to another restaurant. Ms. Elkins counters that she did <u>personally</u> relay her objections to Anderson, <u>personally</u> informed Anderson that his invitation was tantamount to sexual harassment (using those very words) because of his selection of a restaurant which used as its name a vulgarism for breasts; and asked what he would think, with no tone of amusement in her voice, but rather one of disgust, if she invited him to a restaurant that flaunted the slang term "Dicks;" that he flushed and

sputtered his words, dissembling anger and embarrassment by insisting all he wanted was the chicken wings; and that he then grudgingly agree to go to another restaurant. Stevens affirms that the use of the "Dicks" language occurred, denies her own whispered outburst, and denied that Plaintiff had confronted Anderson directly – a dispute over facts that supports Ms. Elkins' contention that Stevens feared precisely the treatment that Ms. Elkins ultimately received. It soon became apparent from his treatment of Ms. Elkins after the incident that his attitude toward her had changed radically.

Finding that while the protest was a protected act, the alleged incident was neither severe nor threatening, and did not interfere with Ms. Elkins' work performance on the premise that one incident could not create a hostile work environment, the Court of Appeals ruled that the court below "properly dismissed Elkins hostile environment claim" before it even considered the other claims (p. 4 of Opinion).

Chain of Adverse actions

> Webb's sexual innuendos and proposals together with his other discriminatory conduct were sufficiently severe and pervasive to make out a sexual harassment claim. In combination, his acts altered the conditions of Beardsley's employment and created an objectively abusive work environment.
> Beardsley v. Webb, 30 F.3d 524, 529 (4th Cir. 1994)

Using Beardsley as authority, Ms. Elkins claims that the above finding was premature: the Hooters incident poisoned Anderson's relationship with her. He then created a hostile environment thereafter by engaging in a chain of retaliatory actions - not in themselves sexual in nature, though inspired by her protest - which as they intensified in severity made it impossible for her to do her job, even before he threatened to dock her salary, and forced her to resign. There was a clear causal connection between her protest and her supervisor's actions (absent the Hooters incident, it is unlikely Anderson would have done what he did - the defendants never alleged that Anderson directed such behavior to Susan Stevens). Goldsmith v. City of Atmore, 996 F.2d 1155 (11th Cir. 1993). **But the Court of Appeals opined that she had failed to show an adverse act that was "an ultimate employment decision such as hiring, granting leave, discharging, promoting and compensation."** (Ct. App. opinion, p. 4, *citing* Page v. Bolger, 645 F.2d 227, 233 (4th Cir. 1981) (*en banc*), that the actions she complained of were "de minimis" - endemic conditions of employment, trivialities: "everyone has to wait for a supervisor to finish a phone call" sorts of inconveniences. The court summarized Ms. Elkins' complaints in a way that missed their point and their impact.

Ms. Elkins complained that subsequent to the Hooters incident Anderson began his campaign of retaliation, and she documented the sequence of events in a daily journal she kept, the original purpose of which was to keep track of her travel and mileage. These and other documents supporting Ms. Elkins'

claims were presented to the court as part of the record. The chain of adverse actions consisted of:

1) Anderson queried her repeatedly about her baby-sitting arrangements (in itself a possible trigger of a complaint of differential treatment based on sex). On September 18, 1996, he put her in the position of having to tell him she was unable to attend an evening meeting because he gave her such short notice she couldn't arrange child care: he later translated this into Ms. Elkins "refusing a directive."

2) On August 27, 1996 Anderson demanded that she drive to Beltsville for a face-to-face meeting in his office: she soon learned that this was to be the first of many such face to face meetings demanded by Anderson. After keeping her waiting for a substantial period of time, and then interrupting their conversation repeatedly to take calls, including lengthy personal calls, it transpired that he simply wanted her to "communicate" with the office more frequently. Not only did Ms. Elkins have a beeper, she also kept him supplied with a copy of her calendar of projected appointments, and submitted weekly expense accounts. **The Court of Appeals characterized this as a trivial incident – "de minimis," the sort of thing that is "endemic to employment."** It was not. For Ms. Elkins to go to Anderson's office meant getting a baby-sitter for her three-year-old and driving 45 minutes each way. She was not paid mileage for trips to or from the Beltsville office, so there was also an unnecessary financial cost to her. Anderson's insistence on her driving into Beltsville to talk to him "face to face" defeated the purpose of giving her the beeper. Ironically, Anderson – who later exhorted Ms. Elkins to "use time wisely" – wasted half a day or more

of Ms. Elkins' (and the company's) work time every time he did this, and severely cut into the time that he knew she needed to prepare for scheduled training sessions.

3) Anderson failed to give Ms. Elkins timely notice of meetings or of their cancellation, and even of their correct location. He blamed Plaintiff for these incidents because she had failed to "keep in touch." Ms. Elkins was entitled to suspect that the oversights were deliberate in view of the fact others were given the information they needed.

4) On October 7, 1996 Anderson failed to notify Ms. Elkins that the time of her scheduled evaluation had been changed; had she not called to confirm, she would not have learned that it was postponed to 1:00 P.M.; at 12:50 she was told Anderson had a one o'clock teleconference he had "forgotten about." She was not released by him to go to Clifton Forge (295 miles away) for a three-day training session that he knew she had scheduled, until 1:45, when he re-scheduled the evaluation to October 15, 1996.

5) Anderson attempted to expand her duties: Without consulting Ms. Elkins, he informed a nursing home director (hereinafter "DON") that Ms. Elkins would be performing "QA," *i.e.* enteral quality assurance. Ms. Elkins, when asked by the DON when she planned to start this, protested to Anderson enteral QA was outside her area of expertise and a full-time program in itself--and Anderson retreated from this decision, assigning the QA to the PCA office in Massachusetts. (Affidavit of G. Keith Anderson of 7/19/99 submitted with Defendant's Motion for Summary Judgment and Memorandum in support thereof).

6) On October 15, 1996, Anderson gave her an evaluation between average and good--slightly above average--but also identified four areas in which he alleged she needed to improve: "strive to manage her tone of voice," "be available M-F, 8-5," "communicate more with supervisor, keep him informed," and "manage time wisely." Perhaps her "tone" was defensive because of the injustice of these criticisms; perhaps her tone is simply direct and businesslike, the tone of a credentialed expert.

One may first ask why, if Anderson were conducting a campaign of retaliation against Ms. Elkin because he was still angered by her accusing him of sexual harassment and queering the good time he had expected at Hooters, he did not simply giver her an unsatisfactory evaluation at this time? **The Court of Appeals noted in a footnote that he rated her above average.** Subsequent events suggest he wanted to provide no evidence of animus. He was sufficiently familiar with anti-discrimination law and guidelines to realize that giving a new employee who was so far clearly satisfactory - had gotten her program underway rapidly and generated a substantial increase in sales - would be strong evidence of hostile intent which she could use in a complaint. If he fired Ms. Elkins, he would make her case. If he wanted her to quit, he had to create a situation she would find intolerable.

To do so was simple: Anderson deliberately did not give her information she needed to make a success of an important conference. On October 17, 1996, Ms. Elkins found herself completely unprepared for a

furious attack from nursing home consultant Carl Prince (hereinafter "Prince") at a major meeting in Richmond of twenty DONs, because Anderson had failed to inform her that Prince wanted only three-day training sessions. **The Court of Appeals completely misunderstood or disregarded the grave significance of the events that occurred on October 17th: this was not a mere matter of Anderson neglecting to give Elkins some unimportant information and thereby exposing her to passing embarrassment.** She later learned Anderson had untruthfully told Prince, who supervised several DONs in Virginia and West Virginia, that she had refused to do training sessions in the way he wanted - that she was insisting on 8-hour sessions because according to Anderson she didn't want to do overnights. Ms. Elkins was not reluctant to do three-day sessions, and regarded them as more efficient for distant homes. The week of August 12th, 1996, after spending a substantial part of the previous weekend in preparation, Ms. Elkins had at the request of the DON spent five 12-hour days giving training sessions at Colton (driving 160 miles each day - 80 to reach the home early in the morning), and Anderson knew it. On October 8, 9, and 10, 1996, she had spent three days in a training session at Clifton Forge, involving a 295 mile drive and three overnights (he had delayed her getting there).

By means of this incident Anderson had set Ms. Elkins up for eventual termination as an unsatisfactory employee: the criteria for satisfactory performance in her job were good rapport with the DONs, and increasing sales of IV products and equipment.

It is erroneous to assume that Anderson, the Senior Pharmacy Manager, whose immediate superior was a regional vice-president, was so incompetent that these oversights and hostile actions, crowded into a short period (54 days less seven week-ends), and sharply escalating after October 1, 1996, were mere banal and inevitable accidents of employment. They were purposeful. Moreover, Ms. Elkins was singled out for this treatment, which seriously interfered with the performance of her job duties. Interviews of long-term employees (similarly situated males except for the one female, Ms. Stevens, who had not complained about the invitation to Hooter's) established that Anderson rarely if ever forgot to give them necessary information; none could recall a specific incident. Termination for cause can ruin a person's professional reputation and career. Ms. Elkins became deeply concerned and alarmed over these incidents, especially the incident with Prince, because she feared she could not regain his good will. Ms. Elkins was careful, after her teaching sessions , to get feedback on what people wanted, and whether or how she could improve the program. She attempted to talk to him to mend matters, and he agreed they should discuss it later over the telephone, but he never returned her calls.

On October 18, 1996, Anderson succeeded in distressing Ms. Elkins to the extent she felt she could no longer work with him. Once again he summoned Ms. Elkins into the Beltsville office or "facility." Ms. Elkins told him that she had already worked 50 hours that week, counting "drive time" and a training session, and that her baby-sitter was not available. Anderson told her that he would no longer allow her to

count travel time as work time, and that she would have to be ready to report in to the "facility" on a daily basis – no more guarantee of the ability to work at home. Ms. Elkins clearly understood she would therefore would lose pay or have to work many more hours for the same pay – that it could take up her whole weekend as well as many evenings. She invoked her original work agreement: Anderson informed her she was an at-will employee, and that he could change the conditions of her employment at any time.

Ms. Elkins consulted with other employees, and found out that she had been singled out for this treatment. No one else had ever been told they could not count travel time as work time: depositions confirmed this. She faxed a letter of resignation later that day. Appendix M.

An ultimate employment decision?

The District Court states of the Plaintiff's retaliation charges (and the Court of Appeals agreed) that "even in the aggregate, these claims amount to nothing more than a non-actionable 'trivial discomfort endemic to employment' [citation omitted]" and finds that "the only substantive complaint is the claim that Anderson altered her employment conditions by refusing to credit Plaintiff's time spent driving to clients as 'work time.'" Appendix B, p 5b. The court found the claim not factually supported by the evidence, accepting Defendant's allegation (Ex. 1 of Def.'s Reply) that as an exempt employee Plaintiff was paid a set salary

for performing her job duties regardless of the hours she worked, and noting that other consultants traveled as much or more. ***Id.***

In reaching this finding, the court appeared to place total reliance on the referenced defense exhibit - travel expense forms for a number of employees, the analysis of which was arguably seriously flawed: the court accepted the defendants' bare assertion that the other exempt employees drove as much or more than Ms. Elkins when in fact, only one employee drove more. Appendix L. The exhibit showed only what the defendants' practice had been up to October 25, 1996: Elkins' formal date of resignation was October 23, 1996, and Ms. Elkins contends she had trouble collecting her last pay.

The defendants' contention that as a salaried employee, Ms. Elkins' remuneration would not have been affected by the number of hours she worked is unproven, since Ms. Elkins resigned on October 18. The question is not whether the company cared if she worked more hours: it is whether it would have cared if she worked substantially fewer hours--in light of the fact that every exempt employee was expected to put in at least 40 hours. Defendant offered no proof that fewer hours - as few as 24 - would not have been punished, other than an after-the-fact allegation. There is evidence PCA was concerned about the number of hours worked. When Ms. Elkins was hired, she signed a statement titled Agreement for Work Hours (Appendix K) acknowledging that she owed the corporation a minimum of 40 hours a week, specifically including drive time. At the bottom of this

agreement was the statement: "If you wish to change your flex-time schedule, a new agreement must be completed and signed." Appendix K. Stevens (the other female exempt employee) stated that she managed her own time, but worked at least 40-50 hours per week including travel time.

Ms. Elkins had scheduled IV therapy seminars through January, 1997, and was aware that there would be weeks when she would have to use the better part of two days per week in travel. She believed her supervisor had both the power and the intention to dock her pay; if this was incorrect - if, as Defendant's counsel alleges, the number of hours she worked was irrelevant "as long as she performed her duties" - then Anderson deliberately misled her. After her October 18, 1996, talk with Anderson, she was on notice that the terms and conditions of her employment had completely changed. She was no longer to have the flexibility and convenience of working from home, but could expect to be called into the Beltsville office daily at Anderson's whim, cutting into her preparation time and seriously interfering with her work (since all her files, resource materials and equipment were at home); she had discovered that she could not count on her supervisor to give her the timely and complete information she would need to do her job, and that in fact he had undercut her with one of her clients, lying about her willingness to do the training wanted. Ms. Elkins was interested in this job, had tried to give outstanding performance, and was proud of her professional skills. She found intolerable the prospect that in order to remain at PCA she would have to work many more hours or risk losing pay (Anderson had to

approve her use of time and expense accounts), "watch her back" for trickery, swallow calculated insult, and risk a termination which would forever affect her professional standing. She looked ahead to a possible future evaluation in which the "drive time" restriction would be the basis for elaborating on the deficiencies Anderson had noted on October 15, 1996, specifically the "wise use of time" - a contention either that she was unable to perform her duties in 40 hours, or had not given the company 40 hours.

The District Court and the Court of Appeals both failed to consider, in invoking the "reasonable and objective person" who theoretically would not have resigned over such a matter, or matters, how another aspect of how the obligation to work significantly more hours would have affected the Plaintiff. If she had to work six days a week or more to provide the company with 40 hours of work exclusive of travel time, and could no longer count on doing most of her preparation for seminars at home, she would lose almost all her time with her young boys - time especially essential to her three-year-old. While Ms. Elkins had signed a statement at the outset of employment recognizing that she was an at-will employee, the company had also made her some written promises - which Defendant Anderson had failed to keep. Even an at-will employee has the right to be free from unwanted sexual overtures, retaliation, and unequal treatment (the "drive-time" issue), and the right to expect that the employer will not arbitrarily abrogate promises she negotiated as a condition of accepting the job. Adler v. American Standard Corp., 291 Md. 231, 432 A.2d 464 (1981). Keith Anderson had

no possible employment-related reason for insisting she report daily to his office for face-to-face meetings - in fact there was good reason to avoid this as inefficient - or for refusing to let her "count drive time as work time."

Did PCA meet its duty, under its own policies, to protect Ms. Elkins from sexual harassment and retaliation? ... Or did it assist in her termination?

Ms. Elkins' resignation letter of October 18, 1996 was promptly referred by Keith Anderson to the Human Resource Director, James W. Brennan. In essence, he got there first with his version of the affair. Mr. Brennan in turn contacted Ms. Elkins to let her know he would conduct an investigation of the allegations in her letter. Ms. Elkins, on resigning, had given a weeks notice, promising to "honor [her] commitment" to conduct two seminars already scheduled in order to avoid the inconvenience of sudden cancellation to the nursing homes. She had also requested that her voice mail message to Carl Prince on the eve of October 17, 1996, be preserved. She actually thought for a fleeting moment after talking to Brennan, that his investigation might result in his telling her that things could be worked out, that she would be allowed to count drive time as work time (since everyone else could) and that he might request that she rescind her resignation. She states that, hearing nothing from him or Anderson to the contrary, she went to her next scheduled seminar, as she had promised - but was told by the Director of Nursing that the seminar was off, that Anderson had told them she was no longer working for PCA, and that Beltsville

had not sent the necessary materials. Anderson indicated, when contacted by phone, that he did not want her to do any more work for the company - thus, he revealed it had been his intention to terminate her employment, establishing that an ultimate employment action had occurred.

On October 22, 1996, Brennan sent Plaintiff a letter telling her that his investigation was complete, that he had determined her charges to be "unfounded," and that her resignation was accepted effective October 23, 1996. Appendix N.

Deposition of Janice Rutkowski (hereinafter "Rutkowski"), regional vice-president for PCA, on June 9, 1999, revealed that she professed to have had little knowledge of Plaintiff's situation, though she stated that if the resignation letter had come to her directly she would have wanted to talk to both the principals. Though she was aware of Brennan's letter of October 22 had been drafted and "marked up" in the Human Resource Department (by attorney Ellen Weitz), Rutkowski said she was uninvolved - did not feel she needed to be involved - and expressed "total faith ... in our Corporate Human Resource..."

Brennan's letter, drafted with the aid of corporate counsel, embodied the company's defensive legal posture, which has consistently denied and/or minimized all of Plaintiff's complaints listed herein. His letter was focused primarily on establishing that Elkins was an at-will employee who had voluntarily resigned, that she did not have a contract, and that Anderson had the right to change "performance

expectations" at any time. He did not deal directly with the question of not counting "drive time" as work time, or recognize that she had been singled out for denial of this usual prerogative, saying only "a significant amount of travel and field work would be required in this position as stated in your offer letter." In other words, Anderson's requirement would stand. He commented that "Anderson never questioned your child care arrangements, however on at least two occasions you stated to him that child care issues prevented you from following a specific directive." Thus Ms. Elkins' fear was realized: Anderson had previously created a baby-sitting crisis by notifying her too late of a meeting, and now used the incident against her; the second incident had occurred on October 18, 1996, the day she resigned. Brennan explicitly found assertions of sexual harassment unfounded--that Anderson made the comment about Hooters "in jest," although protocols attached to PCA's memorandum of February 29, 1996 on the subject of "behavioral standards meant to ensure a work environment free of harassment and other unlawful discrimination" clearly stated there "must be a total absence of joking or teasing of a sexual nature..." (emphasis in original) and went on to cite Anderson's recent "favorable" evaluation of her as proof he bore her no animosity.

As previously noted, his evaluation was in fact only minimally favorable: Ms. Elkins was marked somewhat above average in three areas, but deficient in others. In passing Brennan noted that on this evaluation Anderson had marked her as needing improvement in "Managing Time Wisely." Therefore,

in this evaluation Anderson had indeed actually laid the ground-work for a future unsatisfactory evaluation.

Defendants submitted Brennan's notes on his investigation of Ms. Elkins' complaints, attached to his letter of October 22, 1996 accepting Ms. Elkins resignation as of October 23, 1996. Appendix O (notes on his discussion with Anderson), Appendix P (notes on his discussion with Stevens). These notes reveal that Brennan did not interview Ms. Elkins beyond the original telephone conversation he had on receipt of her resignation letter from Anderson. She had no opportunity to respond to or rebut what various people (who may not have wanted to offend top manager Anderson) said about her. Ms. Elkins disputes that Prince told her before the October 17, 1996 meeting in Richmond that he wanted only 3-day training sessions. She had voluminous evidence of desire to please the DONs; is it inconceivable she would have declined to "market" 3-day sessions in opposition to any DON. These notes show Anderson emphasizing that Ms. Elkins simply didn't want to work 40 hours or do three-day training sessions. It is evident from his notes that Brennan gave no credence whatever to Ms. Elkins. *See* McDonnell Douglas Corp. v. Green, 411 U.S. 792 (1973), for a discussion of intent and pretext in the context of discrimination cases.

It appears that not until Ms. Elkins filed a complaint did Defendant, in February of 1997, gather records of travel time and affidavits on the subject of differential treatment as to count of "drive time" as work time, and on the need of all employees to be available by beeper from 8-5, Monday to Friday. These

records showed that up until October 18, 1996, travel expense accounts of everyone including Elkins were routinely approved, and that all traveled extensively, including Ms. Elkins, who also worked 40-50 hours. Affidavits showed that no one but Elkins was ever told they could not count drive time as work time. Stevens was eloquent on the subject of her freedom to manage her travel time to make the best use of her week, and on allowances for meals and hotels as a major benefit of a job that required so much traveling. She tried to be home on the weekends as much as she could. Dep. Susan Stevens, pp. 15-16, 24-25. Affidavits stated that everyone had to be available to come into the office whenever Anderson wished – but did not deal with the question of how often he actually called them in. Ms. Elkins never challenged that she should be on call like everyone else: she alleged that Anderson called her into the office unnecessarily in order to interrupt her work. None of this material proves that Anderson did not begin a course of severe differential treatment on, or prior to, October 18, 1996. It merely proves what the customary practice of the Defendant was up to that date.

PCA's grievance procedure required an employee to complain to the supervisor who was harassing her. On discovery of the problem via Ms. Elkins' letter of resignation, PCA made no effort to conciliate the matter, or allow Ms. Elkins to rebut Anderson's charges. See EEOC notice, Appendix F, for EEOC guidance in this respect.

The corporate defendant therefore failed to prevent, and in fact aided in the efforts of Anderson to

dismiss Ms. Elkins, accomplished by Brennan's letter accepting her resignation as of October 23, 1996.

Credibility is an unusually important issue in this case. Defendant had in its records, at the time of Elkins' termination on October 22, 1996, information going to both the credibility and character of Anderson: in March, 1996 a Florida employee charged that he had asked her to recreate and back-date a missing document, and then pretend she had just found it; when she protested her innocence of a willing involvement in for the violation of company policy against fraud, she requested anonymity because of her fear Anderson would retaliate. In this instance, he was reprimanded for fraud and counseled, yet in his remarks he specifically denied any "retaliation" against this subordinate. Shortly after, on November 21, 1996 a group of Beltsville pharmacists reported that Anderson was insisting they perform an action which could harm patients and put their licenses in jeopardy. The pharmacists expressed fear for their jobs: since he had threatened them that anyone who refused his order could "leave," they described themselves as "terrified."

Ms. Elkins' character and credibility are untarnished, impeccable, yet the District Court decided virtually every credibility issue, without hearing or testimony, in favor of the Defendants; the Court of Appeals upheld these determinations, without hearing, and did so in conflict with it's own precedent in an analogous case of sexual harassment: "Whether the evidence supported Beardsley's claim or Webb's defenses depended largely on the credibility of the

witnesses and the inferences the jury could reasonably draw from the facts. Whether Webb's 'harassment was sufficiently severe or pervasive is quintessentially a question of fact.'" Beardsley v. Webb, 30 F.3d 524, 530 (4th Cir. 1994), *citing* Paroline v. Unisys Corp., 879 F.2d 100, 105 (4th Cir. 1989), *vacated in part on other grounds* 900 F.2d 27 (4th Cir. 1990) (*en banc*).

When the court moved to the constructive discharge issue after separately dismissing the hostile environment claim, it conceded that Ms. Elkins had in part met the criteria to establish a prima facie case of retaliation set forth in McNairn v. Sullivan, 929 F.2d 974, 980 (4th Cir. 1991), but cited Page v. Bolger, 645 F.2d 227,233 (4th Cir. 1981) (*en banc*) in stating that **she was "only protected against discrimination with regard to ultimate employment decisions such as hiring, granting leave, discharging, promoting and compensating"... and that "...the district court correctly held that Elkins complaints [of her supervisor's abusive treatment] are de minimis as none of the allegations separately or in the aggregate amount to ultimate employment decisions for which Title VII offers a remedy."**

This narrow interpretation is not necessarily correct. The court in Page v. Bolger states in the same discussion that the list of employment decisions recited by the court is not definitive, noting there could be others. Had the court allowed a jury trial, the strength of Ms. Elkins' evidence might reasonably have placed the events within the definition.

Almost every case cited mentions degree of interference with work performance as an important consideration: the court ignored it totally in this case except to disparage it.

Recapitulation

Though the court acknowledged an obligation to view the facts in the light most favorable to the non-moving party and to consider the totality of the circumstances in assessing the retaliation claim, it failed to do so. The court deconstructed the case into its parts and almost totally accepted Defendants' analysis of the facts, conceding to Ms. Elkins only that there was a threshold incident of "protected action" under Title VII in her protest of the Hooters invitation. The court's ruling was clearly erroneous in taking over the jury's function in balancing evidence (and thus, necessarily, credibility) on issues of the seriousness of retaliation and constructive discharge; in deciding that even in the aggregate there was no evidence sufficient to convince a fair-minded jury that Ms. Elkins had been injured, the court ignored genuine issues of material fact. Among these was whether Anderson interfered with Ms. Elkins' ability to do her job, whether he deprived her of any substantial benefit, and whether in threatening her with severe prospective changes in her conditions of work he made her job so intolerable that it was reasonable for her to resign rather than accept the new conditions. One must ask if there is a rational person, the sole parent of small children, who would willingly agree to work many more hours for no pay increase and seldom see her children.

In deciding whether or not Ms. Elkins had suffered an ultimate adverse employment decision in being told she could no longer count "drive time" as work time, the court cited Page v. Bolger, in saying she had not if it did not affect her compensation - then accepted as the definitive disposition of the dispute Defendants' unsupported contention that there could be no monetary consequences to Ms. Elkins as an exempt employee, and therefore no damages to her. But the Page court also says "... we suggest no general test for defining those 'ultimate employment decisions' which alone would be held directly covered by Section 717 [of Title VII] ... there are certainly others than those we have so far specifically identified... " Page v. Bolger, 645 F.2d at 233. It is entirely conceivable that upon the evidence available an objective jury could have found that the Hooters episode was linked with a course of retaliatory action which interfered with the performance of her job, and that Anderson had forced Ms. Elkins to resign by radically altering the conditions of her employment. Subsequent to her departure from PCA, Ms. Elkins suffered substantial loss of pay.

The court erred in its sweeping and cursory dismissal of Ms. Elkins' other claims as well, since all but one are based on the finding that the universal "objective" jury would decide that she had resigned voluntarily. On her breach of contract claim, despite the acknowledgement of at-will status she signed, a fair-minded jury (or a reader of Adler, *supra*) might well have felt that in view of the fact that PCA had made her some promises in a letter, it should have kept them. Such a jury might have considered the public policy implications of allowing an employer to make

even an exempt employee work endless hours in derogation of essential maternal duties. Article 49B of the Maryland Code does not address all of Ms. Elkins' concerns - only those relating to sex discrimination. As to the court's statement that her tortious interference claim must founder because "she utterly failed to allege that Anderson had acted outside the scope of his authority or contrary to corporate interests," it cannot be in the interest of his employer to engage in sexual harassment of a competent employee, subjecting the employer to suit and requiring the expense of recruiting and training another, and such was pleaded in Ms. Elkins' original complaint, and in her opposition to the motion to dismiss her claims.

If the court has an affirmative duty to prevent cases that cannot win from going to trial, it also has the affirmative duty to take care to protect the constitutional right of citizens to a jury trial.

Conclusion

Ms. Elkins prays that this court remand the case for a jury trial, or in the alternative issue a writ of certiorari to review the lower courts' decisions.

Respectfully submitted,

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APPENDIX

Appendix A

IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MARYLAND

Filed
December 14, 1999
Clerk U.S. Dist. Ct

ANTONIA J. H. ELKINS
v.
PHARMACY CORPORATION OF AMERICA, et al.

Civil No. WMN-98-2839

ORDER

In accordance with the foregoing Memorandum and for the reasons stated therein, IT IS the 13th Day of December, 1999, by the United States District Court for the District of Maryland, ORDERED:

1. That Defendants' Motion for Summary Judgment (Paper No. 20) is hereby GRANTED;
2. That judgment is hereby granted in favor of Defendants and against Plaintiff;
3. That this action is hereby CLOSED;
4. That any and all prior rulings made by this Court disposing of any claims against any parties are incorporated by reference herein and this order shall be deemed to be a final judgment within the meaning of Fed. R. Civ. P. 58; and

5. That the Clerk of the Court shall mail copies of the foregoing Memorandum and this Order to all counsel of record.

/s/_____
William M. Nickerson
United States District Judge

Appendix B

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND

Filed
December 14, 1999
Clerk U.S. Dist. Ct

ANTONIA J. H. ELKINS
v.
PHARMACY CORPORATION OF AMERICA, et al.

Civil No. WMN-98-2839

MEMORANDUM

Before the Court is Defendants' Motion for Summary Judgment Paper No. 20. The motion is fully briefed. Upon a review of the motion and the applicable case law, the Court determines that no hearing is necessary (Local Rule 105.6) and that Defendants' motion will be granted.

Plaintiff brings this action against her former employer and her former supervisor. The complaint includes sexual harassment and retaliation claims under Title VII, and well as state law claims of "Abusive Discharge," "Breach of Contract," and "Interference with the Contract of Another."[1] The relevant facts are as follows.

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[1] The interference with contract claim is brought against Defendant Anderson only.

Plaintiff was employed as a IV-Nurse Consultant by Defendant Pharmacy Corporation of America, Inc. ["PCA"] on or about July 8, 1996. Shortly after Plaintiff began work, Defendant G. Keith Anderson became her immediate supervisor. In early August of 1996, Anderson, Plaintiff, and another employee of PCA, Susan Stevens, traveled to Richmond, Virginia for a business meeting. While in Richmond, Anderson suggested that the three of them go to a "Hooters" Restaurant for dinner. Plaintiff responded that she did not want to eat at Hooters and the three of them dined elsewhere. Plaintiff asserts, however, that after this incident, Anderson began to treat her less favorably based upon refusal to go to Hooters. On October 18, 1996, Plaintiff resigned her position, stating to Anderson, "I can no longer continue to work for you." Plaintiff filed this action on August 19, 1998. The parties have now completed discovery and Defendants have filed a motion for summary judgment as to all claims.

Pursuant to Fed. R. Civ. P. 56(c), summary judgment is appropriate where "there is no genuine issue as to any material fact and . . . the moving party is entitled to a judgment as a matter of law." Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248 (1986). The non-moving party is entitled to have "all reasonable inferences . . . drawn in its respective favor." Felty v. Graves-Humphreys Co., 818 F.2d 1126, 1129 (4th Cir. 1987). Only disputes over facts that might affect the outcome of the suit under the governing laws will properly preclude the entry of summary judgment. Factual disputes that are irrelevant or unnecessary will not be counted." Anderson, 477 U.S. at 248.

While viewing the evidence in the light most favorable to Plaintiff, the Court nonetheless concludes that the evidence is insufficient to support any of Plaintiff's claims. As to Plaintiff's Title VII sexual harassment claim, the only comment or incident that was of an arguable sexual nature was Anderson's suggestion that Plaintiff and Stevens accompany him to a Hooters Restaurant. There can be no argument that this

single suggestion, which apparently was readily withdrawn when Plaintiff voiced her disapproval, could support a finding of a hostile work environment. Compare Pesso v. Montgomery Gen. Hosp., 181 F.3d 90, 1999 WL 326090 (4th Cir. 1999) (table) (affirming district court's grant of summary judgment on sexual harassment claim where plaintiff's supervisor suggested she and plaintiff get a hotel room together while attending conference).

To support her retaliation claim under Title VII, Plaintiff must point to some "ultimate employment decision" from which she suffered as a result of her rejection of the suggestion that she dine at Hooters.[2] Page v. Bolger, 645 F.2d 227, 233 (4th Cir.), cert. denied, 454 U.S. 892 (1981). Not every employment decision, however, that displeases the employee constitutes an "adverse employment action" for the purposes of Title VII. Rather, as the Fourth Circuit has repeatedly recognized, "there are many interlocutory or mediate

[2] The Court will assume, without deciding that Plaintiff's refusal to go to Hooters was a "protected activity" within the context of Title VII.

decisions having no immediate effect upon employment conditions which were not intended to fall within the direct proscriptions of [Title VII]." Id.[3]

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[3] Plaintiff appears to argue that the Supreme Court's 1998 decision in Burlington Indus., Inc. v. Ellerth, 524 U.S. 742 (1998), either eliminated the need to show that the employment action was "adverse," or significantly broadened the category of actions that can be so considered. The Fourth Circuit recently discussed the impact of the Ellerth decision on the adverse employment requirement and reaffirmed the continuing validity of Page v. Bolger:

> [w]e recognize that the Supreme Court has recently suggested that Title VII liability can arise from a "tangible employment action," which the Court defined to include not only "hiring, firing, failing to promote, . . . [and] significant change in benefits," but also "reassignment with significantly different responsibilities." [Ellerth] discussing "tangible employment action" as trigger for employer's strict liability under Title VII for supervisor's discriminatory acts); see also Reinhold v. Commonwealth of Virginia, 151 F.3d 172, 175 (4th Cir. 1998). In light of the clear precedent indicating that Title VII awards damages "only against employers who are proven to have taken adverse employment action" for a discriminatory reason, St. Mary's Honor Ctr. v. Hicks, 509 U.S. 502, 523-24 (1993), and based on our certainty that Congress did not intend Title VII to provide redress for trivial discomforts endemic to employment, however, we conclude that reassignment can only form the basis of a valid Title VII claim if the plaintiff can show that the reassignment had some significant detrimental effect on her.

Boone v. Goldin, 178 F.3d 253, 256 (4th Cir. 1999).

To support her retaliation claim, Plaintiff complains that on several occasions, Anderson neglected to inform her of changes in meeting times and places, and that Anderson would make her wait while he took personal telephone calls. Even in the aggregate, these claims amount to nothing more than a nonactionable "trivial discomfort endemic to employment." Boone, 178 F.3d at 256. The only substantive complaint, and the complaint upon which Plaintiff chiefly relies, is the claim that Anderson altered her employment conditions by refusing to credit Plaintiff's time spent driving to clients as "work time." This claim, however, is not factually supported by the evidence. First, Plaintiff was hired as an exempt salaried employee. As such, she was paid a set salary for performing her job duties, regardless of the amount of time it took to perform those duties. Plaintiff's salary was not changed after the Hooters incident, nor does Plaintiff allege that she was assigned additional clients to contact. In addition, the undisputed evidence demonstrates that other consultants employed by Defendant traveled as much or more than Plaintiff. See Def.'s Reply Exh. 1 (travel vouchers).

As to Plaintiff's various state law claims, Plaintiff provides no support, whatsoever. Her breach of contract claim fails because she was an at will employee.[4] As an at will employee, Plaintiff cannot rely on claims of alleged Title VII violations to support

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[4] Plaintiff points to the letter in which Defendant PCA offered her employment (Plaintiff's Exh. 3) and an "Agreement for Work Hours (Plaintiff's Exh. 4) as support for her claim that she was something other than an at will employee. The Court has reviewed those documents and

her abusive discharge claim. See Marrs v. Marriott Corp., 830 F. Supp. 274, 278 (D. Md. 1992). Finally, as to Plaintiff's interference with contract claim against Anderson, the claim fails as Plaintiff has offered nothing to establish that Anderson was acting outside the scope of his employment in his interactions with Plaintiff. See Bleich v. Florence Crittendon Services of Baltimore, Inc. 98 Md. App. 123, 147 (1993) (holding "when an employee acts within the scope of her employment, or as an agent of her employer, she cannot be held liable for interfering with the contract, business relationship, or economic relationships, between the employer and another.")

For all the above stated reasons, the Court concludes that Defendants' motion must be granted. A separate order will issue.

/s/_____
William M. Nickerson
United States District Judge

Dated: December 13, 1999.

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finds nothing in them to indicate that Plaintiff was promised any set term of employment.

Appendix C

UNPUBLISHED

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

ANTONIA J. H. ELKINS,
Plaintiff-Appellant,

v.

PHARMACY CORPORATION OF AMERICA;
KEITH ANDERSON,
Defendant-Appellee.

No. 00-1077

Appeal from the United States District Court
For the District of Maryland, at Greenbelt.
William M. Nickerson, District Judge.
(CA-98-2839-WMN)

Submitted: June 27, 2000

Decided: July 12, 2000

Before WIDENER, MURNAGHAN, and MOTZ,
Circuit Judges.

Affirmed by unpublished per curiam opinion.

COUNSEL

Jason A. Kerpelman, Washington, D.C., for Appellant. Peter J. Sommer, Samuel J. Manigione, SOMMER & STEELE, L.L.C., Baltimore, Maryland, for Appellee.

Unpublished opinions are not binding precedent in this circuit. See Local Rule 36(c).

OPINION

PER CURIAM:

Antonia Elkins appeals the district court's order granting summary judgment to her former employer and supervisor and dismissing her employment discrimination action and associated state law claims. We affirm.

Elkins was employed as an I.V. Nurse Consultant by Defendant Pharmacy Corporation of America beginning on July 8, 1996. Elkins' job entailed developing instruction programs for nursing homes and permitted Elkins to do much of her work from home. Her job, however, required on-site visits to

nursing homes in Maryland, Virginia and Washington, D.C., and thus Elkins traveled frequently.

On August 5, 1996, Elkins, a co-worker, and Elkins' supervisor, Defendant Keith Anderson, traveled to Richmond, Virginia for a conference. Anderson suggested they eat dinner at "Hooters" restaurant. Elkins rejected the suggestion as inappropriate. She believes that, subsequent to this incident, Anderson treated her unfavorably.

Elkins alleges that over the next several weeks Anderson occasionally asked Elkins if she was having "babysitting problems," which Elkins believed was intended to intimidate her. On August 27, 1996, Anderson called her into the office for a meeting Elkins believed could have been conducted over the telephone, kept her waiting before the meeting, and answered both business and personal telephone calls during their meeting. On September 18, 1996, Anderson informed Elkins of a meeting later that evening, which Elkins contends should have been conveyed earlier to accommodate her babysitting arrangements.

On October 1, 1996, Anderson failed to inform Elkins that a meeting had been canceled. On October 7, 1996, Anderson rescheduled Elkins ninety-day evaluation, first for later in the day and then for a different day.[1] On October 17, 1996, Anderson

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[1] Anderson gave Elkins an above-average performance evaluation.

neglected to inform Elkins that some of her clients wanted a specific type of training program, which left her inadequately prepared to handle questions posed to her at a meeting that day. Finally, on October 18, 1996, Anderson told her that her travel time would no longer be counted as work time. Elkins resigned that day.

Elkins filed suit, alleging a hostile work environment, retaliation, constructive discharge, breach of contract, abusive discharge and tortious interference with a contract. The district court entered summary judgment for the Defendants, finding Elkins' evidence insufficient to create a genuine issue of material fact.

Elkins argues that the district court improperly engaged in fact finding and incorrectly applied the relevant law. This court reviews de novo a district court's order granting summary judgment and views the facts in the light most favorable to the nonmoving party. *See Scheduled Airlines Traffic Offices, Inc. v. Objective Inc.*, 180 F.3d 583, 590-91 (4th Cir. 1999). Summary judgment is appropriate unless a reasonable jury could return a verdict for the nonmoving party on the evidence presented. *See Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 247-48 (1986).

To state a claim for hostile work environment, a plaintiff must show that: (1) the harassment was unwelcome; (2) the harassment was based on her sex; (3) the harassment was sufficiently severe or pervasive to alter the conditions of employment and create an abusive atmosphere; and (4) there is some basis for

imposing liability on the employer. *See Causey v. Balog*, 162 F.3d 795, 801 (4th Cir. 1998). In order to determine whether the conduct alleged by Elkins was sufficiently severe or pervasive to bring it within Title VII's purview, the court examines the totality of the circumstances, including "[t]he frequency of the discriminatory conduct; its severity; whether it is physically threatening or humiliating, or a mere offensive utterance; and whether it unreasonably interferes with an employee's work performance." *Harris v. Forklift Sys., Inc.*, 510 U.S. 17, 22 (1993).

Construing the evidence in the light most favorable to Elkins, the district court correctly noted that the alleged sexual harassment amounted to a single remark that was neither severe nor threatening and did not interfere with Elkins' work performance. Thus, the district court properly dismissed Elkins' hostile environment claim.

To establish a prima facie case of retaliation, Elkins had to show that: (1) she engaged in protected activity; (2) her employer took adverse action against her; and (3) a sufficient causal connection existed between her protected activity and her employer's adverse action. *See McNairn v. Sullivan*, 929 F.2d 974, 980 (4th Cir. 1991). Thus, assuming Elkins' refusal of her supervisor's dinner suggestion was a protected activity, Elkins is only protected against discrimination with regard to ultimate employment decisions such as hiring, granting leave, discharging, promoting, and compensating. See *Page v. Bolger*, 645 F.2d 227, 233 (4th Cir. 1981) (en banc).

Elkins claims that Anderson's actions in arranging meetings on short notice, keeping Elkins waiting before meeting with her, taking telephone calls during meetings with Elkins, and failing to inform her when meetings were canceled or rescheduled were adverse employment actions. The district court correctly held that Elkins' complaints are de minimus as none of the allegations separately or in the aggregate amount to ultimate employment decisions for which Title VII offers a remedy.

Elkins also argues that Anderson's statement that she could no longer count travel time as work time was an ultimate employment decision because it required her to work additional hours to receive the same salary. Elkins does not dispute that she was a salaried employee. Thus, even if Anderson made the alleged statement, Elkins' salary would have remained unchanged regardless of the number of hours she worked. Accordingly, the district court properly dismissed Elkins' retaliation claim.

Elkins' complaint also alleges a constructive discharge theory. "A constructive discharge occurs when an employer creates intolerable working conditions in a deliberate effort to force the employee to resign." *Carter v. Ball*, 33 F.3d 450, 459 (4th Cir. 1994). Whether working conditions are intolerable is assessed by the objective standard of whether a reasonable person in the employee's position would have felt compelled to resign. *See Munday v. Waste Management of N. Am. Inc.*, 126 F.3d 239, 244 (4th Cir. 1997)., *cert. denied*, 522 U.S. 1116 (1998). The incidents alleged by Elkins did not objectively create sufficiently intolerable

working conditions to force a reasonable person to resign.

Elkins next contends that she enjoyed a contractual relationship with her employer that placed her outside the realm of at-will employees and protected her from discharge for improper reasons. As discussed, however, Elkins was not discharged, even constructively, but rather resigned her position voluntarily. Moreover, in light of the evidence submitted by the parties, no reasonable juror could find that Elkins was anything more than an at-will employee. Accordingly, the district court properly granted summary judgment on Elkins' breach of contract claim.

Elkins also asserted a tort claim for abusive discharge. Under Maryland law, a tort action for wrongful discharge is not actionable if there is a statutory remedy available. *See Parlato v. Abbott Labs.*, 850 F.2d 203, 206-07 (4th Cir. 1988); *see also Makovi v. Sherwin-Williams Co.*, 561 A.2d 179, 190 (Md. 1989) (existence of state and federal statutory remedies for discriminatory discharge makes common law tort action for wrongful discharge unactionable). Pursuant to Md. Ann. Code art. 49B and Title VII, 42 U.S.C. Section 2000e-2 (1994), a statutory remedy exists for employment discrimination. Therefore, the district court properly dismissed Elkins' claim of abusive discharge.

Finally, the district court properly granted summary judgment on Elkins' tortious interference claim. In order to state a cause of action for tortious

interference with a business relationship, a plaintiff must allege more than mere malice; she must also allege that the defendant acted outside the scope of his employment without the intent to further the interests of the employer. *See Miller v. Ratner*, 114 Md. App. 18, 60-61 (1997); *Bleich v. Florence Crittenton Servs. Of Baltimore, Inc.*, 98 Md. App. 123, 146-47 (Md. App. 1993). Moreover, the tort feasor's conduct must cause the plaintiff actual damage. *See Bleich*, 98 Md. App. At 146-47. While Elkins alleged that Anderson acted with malice, she utterly failed to allege that he acted outside the scope of his authority or contrary to corporate interests. See id. at 148. Consistent with our conclusion that Elkins suffered no adverse action, we also find that she failed to present facts from which a reasonable jury could conclude that she suffered any actual damage. Accordingly, Elkins failed to state a claim for tortious interference with a business relationship under Maryland law.

We find no reversible error and affirm the order of the district court. We dispense with oral argument because the facts and legal contentions are adequately presented in the materials before the court and argument would not aid the decisional process.

AFFIRMED

Appendix D

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

FILED
August 18, 2000

No. 00-1077
CA-98-2839-WMN

ANTONIA J. H. ELKINS

Plaintiff - Appellant

v.

PHARMACY CORPORATION OF AMERICA; KEITH ANDERSON

Defendants - Appellees

On Petition for Rehearing and Rehearing En Banc

The appellant's petition for rehearing and rehearing en banc was submitted to this Court. As no member of this Court or the panel requested a poll on the petition for rehearing en banc, and

As the panel considered the petition for rehearing and is of the opinion that it should be denied,

IT IS ORDERED that the petition for rehearing and rehearing en banc is denied.

For the Court,
/s/ Patricia S. Connor

CLERK

Appendix E

United States Code

TITLE 42 - THE PUBLIC HEALTH AND WELFARE

CHAPTER 21 - CIVIL RIGHTS

SUBCHAPTER VI - EQUAL EMPLOYMENT OPPORTUNITIES

Sec. 2000e-2. Unlawful employment practices

(a) Employer practices
It shall be an unlawful employment practice for an employer -

(1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin; or

(2) to limit, segregate, or classify his employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's race, color, religion, sex, or national origin.

(b) Employment agency practices
It shall be an unlawful employment practice for an

employment agency to fail or refuse to refer for employment, or otherwise to discriminate against, any individual because of his race, color, religion, sex, or national origin, or to classify or refer for employment any individual on the basis of his race, color, religion, sex, or national origin.

(c) Labor organization practices
It shall be an unlawful employment practice for a labor organization -

(1) to exclude or to expel from its membership, or otherwise to discriminate against, any individual because of his race, color, religion, sex, or national origin;

(2) to limit, segregate, or classify its membership or applicants for membership, or to classify or fail or refuse to refer for employment any individual, in any way which would deprive or tend to deprive any individual of employment opportunities, or would limit such employment opportunities or otherwise adversely affect his status as an employee or as an applicant for employment, because of such individual's race, color, religion, sex, or national origin; or

(3) to cause or attempt to cause an employer to discriminate against an individual in violation of this section.

(d) Training programs
It shall be an unlawful employment practice for any employer, labor organization, or joint labor-

management committee controlling apprenticeship or other training or retraining, including on-the-job training programs to discriminate against any individual because of his race, color, religion, sex, or national origin in admission to, or employment in, any program established to provide apprenticeship or other training.

Appendix F

The U.S. Equal Employment Opportunity Commission

EEOC Notice No. N 915-050, 3/19/90

1. SUBJECT: Policy Guidance on Current Issues of Sexual Harassment.
2. EFFECTIVE DATE: Upon receipt.
3. EXPIRATION DATE: As an exception to EEOC Order 295.001, Appendix B, Attachment 4, § a(5), this notice will remain in effect until rescinded or superseded.
4. SUBJECT MATTER:
This document provides guidance on defining sexual harassment and establishing employer liability in light of recent cases.

Section 703(a)(1) of Title VII, 42 U.S.C. § 2000e-2(a) provides:

It shall be an unlawful employment practice for an employer - -

... to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms conditions or privileges of employment, because of such individual's race, color, religion, sex, or national origin[.]

In 1980 the Commission issued guidelines declaring sexual harassment a violation of Section 703 of Title VII, establishing criteria for determining when

unwelcome conduct of a sexual nature constitutes sexual harassment ...

GUIDANCE ...

C. Determining Whether a Work Environment Is "Hostile"

The Supreme Court said in Vinson that for sexual harassment to violate Title VII, it must be "sufficiently severe or pervasive 'to alter the conditions of [the victim's] employment and create an abusive working environment.'" 106 S. Ct. at 2406 (quoting Henson v. City of Dundee, 682 F.2d at 904. Since "hostile environment' harassment takes a variety of forms, many factors may affect this determination, including: (1) whether the conduct was verbal or physical, or both; (2) how frequently it was repeated; (3) whether the conduct was hostile and patently offensive; (4) whether the alleged harasser was a co-worker or a supervisor; (5) whether the others joined in perpetrating the harassment; and (6) whether the harassment was directed at more than one individual.

In determining whether unwelcome sexual conduct rises to the level of a "hostile environment" in violation of Title VII, the central inquiry is whether the conduct "unreasonably interfer[es] with an individual's work performance" or creates "an intimidating, hostile, or offensive working environment." 29 C.F.R. § 1604.11(a)(3). Thus, sexual flirtation or innuendo, even vulgar language that is trivial or merely annoying, would probably not establish a hostile environment.

1) **Standard for Evaluating Harassment** - In determining whether harassment is sufficiently severe or pervasive to create a hostile environment, the harasser's conduct should be evaluated from the objective standpoint of a "reasonable person." Title VII does not serve "as a vehicle for vindicating the petty slights suffered by the hypersensitive." Zabkowicz v. West Bend Co., 589 F. Supp. 780, 784, 35 EPD ¶ 34, 766 (E.D. Wis. 1984). See also Ross v. Comsat, 34 FEP cases 260, 265 (D. Md. 1984), rev'd on other grounds, 759 F.2d 355 (4th Cir. 1985). Thus, if the challenged conduct would not substantially affect the work environment of a reasonable person, no violation should be found.

Example - Charging Party alleges that her coworker made repeated unwelcome sexual advances toward her. An investigation discloses that the alleged "advances" consisted of invitations to join a group of employees who regularly socialized at dinner after work. The coworker's invitations, viewed in that context and from the perspective of a reasonable person, would not have created a hostile environment and therefore did not constitute sexual harassment.

A "reasonable person" standard also should be applied to be more basic determination of whether challenged conduct is of a sexual nature. Thus, in the above example, a reasonable person would not consider the co-worker's invitations sexual in nature, and on that basis as well no violation would be found.

This objective standard should not be applied in a vacuum, however. Consideration should be given to

the context in which the alleged harassment took place. As the Sixth Circuit has stated, the trier of fact must "adopt the perspective of a reasonable person's reaction to a similar environment under similar or like circumstances." Highlander v. K.F.C.National Management Co., 805 F.2d 644, 650, 41 EPD ¶ 36,675 (6th Cir. 1986).[20]

The reasonable person standard should consider the victim's perspective and not stereotyped notions of acceptable behavior. For example, the Commission believes that a workplace in which sexual slurs, displays of "girlie" pictures, and other offensive conduct abound can constitute a hostile work environment even if many people deem it to be harmless or insignificant. Cf. Rabidue v. Osceola Refining Co., 805 F.2d 611, 626, 41 EPD ¶ 36,643 (6th Cir. 1986) (Keith, C.J., dissenting), cert. denied, 107 S. Ct. 1983, 42 EPD 36,984 (1987). Lipsett v. University of Puerto Rico, 864 F.2d 881, 898 48 EPD ¶ 38,393 (1st Cir. 1988).

2) **Isolated Instances of Harassment** - Unless the conduct is quite severe, a single incident or isolated incidents of offensive sexual conduct or remarks generally do not create an abusive environment. As the Court noted in Vinson, "mere utterance of an ethnic or racial epithet which engenders offensive feelings in an employee would not affect the conditions of employment to a sufficiently significant degree to violate Title VII." 106 S.Ct. at 2406 (quoting Rogers v. EEOC, 454 F.2d 234, 4 EPD ¶ 7597 (5th Cir. 1971), cert. denied, 406 U.S. 957, 4 EPD ¶ 7838 (1972)). A "hostile environment" claim generally requires a showing of a

pattern of offensive conduct.[21] In contrast, in "quid pro quo" cases a single sexual advance may constitute harassment if it is linked to the granting or denial of employment benefits.[22]

But a single, unusually severe incident of harassment may be sufficient to constitute a Title VII violation; the more severed the harassment, the less need to show a repetitive series of incidents. This is particularly true when the harassment is physical.[23] Thus, in Barrett v. Omaha National Bank, 584 F. Supp, 22, 35 FEP Cases 585 (D. Neb. 1983), aff'd, 726 F.2d 424, 33 EPD ¶ 34,132 (8th Cir. 1984), one incident constituted actionable sexual harassment. The harasser talked to the plaintiff about sexual activities and touched her in an offensive manner while they were inside a vehicle from which she could not escape.[24]

The Commission will presume that the unwelcome, intentional touching of a charging party's intimate body areas is sufficiently offensive to alter the condition of her working environment and constitute a violation of Title VII. More so than in the case of verbal advances or remarks, a single unwelcome physical advance can seriously poison the victim's working environment. If an employee's supervisor sexually touches that employee, the Commission normally would find a violation. In such situations, it is the employer's burden to demonstrate that the unwelcome conduct was not sufficiently severe to create a hostile work environment.

When the victim is the target of both verbal and non-intimate physical conduct, the hostility of the

environment is exacerbated and a violation is more likely to be found. Similarly, incidents of sexual harassment directed at other employees in addition to the charging party are relevant to a showing of hostile work environment. Hall v. Gus Construction Co., 842 F.2d 1010, 46 EPD ¶ 37,905 (8th Cir. 1988); Hicks v. Gates Rubber Co., 833 F.2d 1406, 44 EPD ¶ 37,542 (10th Cir. 1987); Jones v. Flagship International, 793 F.2d 714, 721 n.7, 40 EPD ¶ 36,392 (5th Cir. 1986), cert. denied, 107 S. Ct. 952, 41 EPD ¶ 36,708 (1987).

3) **Non-physical Harassment** - When the alleged harassment consists of verbal conduct, the investigation should ascertain the nature, frequency, context, and intended target of the remarks. Questions to be explored might include:

Did the alleged harasser single out the charging party?
Did the charging party participate?
What was the relationship between the charging party and the alleged harasser(s)?
Were the remarks hostile and derogatory?

No one factor alone determines whether particular conduct violates Title VII. As the Guidelines emphasize, the Commission will evaluate the totality of the circumstances. In general, a woman does not forfeit her right to be free from sexual harassment by choosing to work in an atmosphere that has traditionally included vulgar, anti-female language. However, in Rabidue v. Osceola Refining Co., 805 F.2d 611, 41 EPD ¶ 36,643 (6th Cir. 1986), cert. denied, 107 S. Ct. 1983, 42 EPD ¶ 36,984 (1987), the Sixth Circuit rejected the plaintiff's claim of harassment in such a situation.[25]

One of the factors the court found relevant was "the lexicon of obscenity that pervaded the environment of the workplace both before and after the plaintiff's introduction into its environs, coupled with the reasonable expectations of the plaintiff upon voluntarily entering that environment." 805 F.2d at 620. Quoting the district court, the majority noted that in some work environments, "`humor and language are rough hewn and vulgar. Sexual jokes, sexual conversations, and girlie magazines may abound. Title VII was not meant to - - or can - - change this.`" Id. At 620-21. The court also considered the sexual remarks and poster at issue to have a "de minimus effect on the plaintiff's work environment when considered in the context of a society that condones and publicly features and commercially exploits open displays of written and pictorial erotica at the newsstands, on prime-time television, at the cinema, and in other public places." Id. at 622.

The Commission believes these factors rarely will be relevant and agrees with the dissent in Rabidue that a woman does not assume the risk of harassment by voluntarily entering an abusive, anti-female environment. "Title VII's precise purpose is to prevent such behavior and attitudes from poisoning the work environment of classes protected under the Act." 805 F.2d at 626 (Keith, J., dissenting in part and concurring in part). Thus, in a decision disagreeing with Rabidue, a district court found that a hostile environment was established by the presence of pornographic magazines in the workplace and vulgar employee comments concerning them; offensive sexual comments made to

and about plaintiff and other female employees by her supervisor; sexually oriented pictures in a company-sponsored movie and slide presentation; sexually oriented pictures and calendars in the workplace; and offensive touching of plaintiff by a co-worker. Barbetta v. Chemlawn Services Corp., 669 F. Supp. 569, 45 EPD ¶ 37,568 (W.D.N.Y. 1987). The court held that the proliferation of pornography and demeaning comments, if sufficiently continuous and pervasive "may be found to create an atmosphere in which women are viewed as men's sexual playthings rather than as their equal coworkers." Barbetta, 669 F. Supp. At 573. The Commission agrees that, depending on the totality of circumstances, such an atmosphere may violate Title VII. See also Waltman v. International Paper Co., 875 F.2d 468, 50 EPD ¶ 39,106 (5th Cir. 1989), in which the 5th Circuit endorsed the Commission's position in its amicus brief that evidence of ongoing sexual graffiti in the workplace, not all of which was directed at the plaintiff, was relevant to her claim of harassment. Bennett v. Coroon & Black Corp., 845 F.2d 104, 46 EPD ¶ 37,955 (5th Cir. 1988) (the posting of obscene cartoons in an office men's room bearing the plaintiff's name and depicting her engaged in crude and deviant sexual activities could create a hostile work environment).

4) **Sex-based Harassment** - Although the Guidelines specifically address conduct that is sexual in nature, the Commission notes that sex-based harassment - - that is, harassment not involving sexual activity or language - - may also give rise to Title VII liability (just as in the case of harassment based on race, national origin or religion) if it is "sufficiently patterned or

pervasive" and directed at employees because of their sex. Hicks v. Gates Rubber Co., 833 F.2d at 1416; McKinney v. Dole, 765 F.2d 1129, 1138, 37 EPD ¶ 35,339 (D.C. Cir. 1985).

Acts of physical aggression, intimidation, hostility or unequal treatment based on sex may be combined with incidents of sexual harassment to establish the existence of discriminatory terms and conditions of employment. Hall v. Gus Construction Co., 842 F.2d 1014; Hicks v. Gates Rubber Co., 833 F. 2d at 1416.

5) **Constructive Discharge** - Claims of "hostile environment" sexual harassment often are coupled with claims of constructive discharge. If constructive discharge due to a hostile environment is proven, the claim will also become one of "quid pro quo"harassment.[26] It is the position of the Commission and a majority of courts that an employer is liable for constructive discharge when it imposes intolerable working conditions in violation of Title VII when those conditions foreseeably would compel a reasonable employee to quit, whether or not the employer specifically intended to force the victim's resignation. See Derr v. Gulf Oil Corp., 796 F.2d 340, 343-44, 41 EPD ¶ 36,468 (10th Cir. 1986); Goss v. Exxon Office Systems Co., 747 F.2d 885, 888, 35 EPD ¶ 34, 768 (3d Cir. 1984); Nolan v. Cleland, 686 F.2d 806, 812-15, 30 EPD ¶ 33,029 (9th Cir. 1982); Held v. Gulf Oil Co., 684 F.2d 427, 432, 29 EPD ¶ 32,968 (6th Cir. 1982); Clark v. Marsh, 655 F.2d 1168, 1175 n.8, 26 EPD ¶ 32,082 (D.C. Cir. 1981); Bourque v. Powell Electrical Manufacturing Co., 617 F.2d 61, 65, 23 EPD ¶ 30,891 (5th cir. 1980); Commission Decision 84-1, CCH EEOC Decision ¶ 6839. However,

the Fourth Circuit requires proof that the employer imposed the intolerable conditions with the intent of forcing the victim to leave. See EEOC v. Federal Reserve Bank of Richmond, 698 F.2d 633, 672, 30 EPD ¶ 33,269 (4th Cir. 1983). But this case is not a sexual harassment case and the Commission believes it is distinguishable because specific intent is not likely to be present in "hostile environment" cases.

An important factor to consider is whether the employer had an effective internal grievance procedure. (See Section E, Preventive and Remedial Action). The Commission argued in its Vinson brief that if an employee knows that effective avenues of complaint and redress are available, then the availability of such avenues itself becomes a part of the work environment and overcomes, to the degree it is effective, the hostility of the work environment. As Justice Marshall noted in his opinion in Vinson, "Where a complainant without good reason bypassed an internal complaint procedure she knew to be effective, a court may be reluctant to find constructive termination ...." 106 S.Ct. at 2411 (Marshall, J., concurring in part and dissenting in part). Similarly, the court of appeals in Dornhecker v. Malibu Grand Prix Corp., 828 F.2d 307, 44 EPD ¶ 37,557 (5TH Cir. 1987), held the plaintiff was not constructively discharged after an incident of harassment by a co-worker because she quit immediately, even though the employer told her she would not have to work with him again, and she did not give the employer a fair opportunity to demonstrate it could curb the harasser's conduct.

[D. Deleted 6/1999]

E. Preventive and Remedial Action

1) **Preventive Action** - The EEOC'S Guidelines encourage employers to:

take all steps necessary to prevent sexual harassment from occurring, such as affirmatively raising the subject, expressing strong disapproval, developing appropriate sanctions, informing employees of their right to raise and how to raise the issue of harassment under Title VII, and developing methods to sensitize all concerned.

29 C.F.R. § 1604.11(f). An effective preventive program should include an explicit policy against sexual harassment that is clearly and regularly communicated to employees and effectively implemented. The employer should affirmatively raise the subject with all supervisory and non- supervisory employees, express strong disapproval, and explain the sanctions for harassment. The employer should also have a procedure for resolving sexual harassment complaints. The procedure should be designed to "encourage victims of harassment to come forward" and should not require a victim to complain first to the offending supervisor. See Vinson, 106 S. Ct. at 2408. It should ensure confidentiality as much as possible and provide effective remedies, including protection of victims and witnesses against retaliation.

Appendix G

Hooters Restaurant Advertisement
www.originalhooter.com/saga/history_pa6.html

Photograph used in the advertisement courtesy of
Playboy Magazine, Copyright © 1986 Playboy

Appendix H

TIME Magazine:

BUSINESS OCTOBER 13, 1997 VOL. 150 NO. 15

SEXISM WILL BE SERVED

IN SETTLING A SEX-DISCRIMINATION CASE, THE HOOTERS RESTAURANT CHAIN PROTECTS ITS JIGGLY HIRING PRACTICES

BY ADAM ZAGORIN /WASHINGTON

Men who dine at Hooters restaurants have certain expectations, some of which may have to do with food and drink. But **the chain's primary attraction, waitresses of ample bosom and less than ample costume**, got some measure of legal protection last week. The company settled a class action in Chicago brought by men who claimed sexual discrimination when the chain refused to hire them as waiters.

Atlanta-based Hooters of America employs 10,000 "Hooters Girls," young women the chain describes as "the surfer girls next door." Got up in orange short-shorts and tight-fitting tops, they earn $2.13 an hour plus tips dispensing food, drink and cheerleader charm at the company's 204 restaurants in 40 states and five foreign countries...

... Hooters didn't try to claim that femininity was essential to serving food; rather, that scantily clad waitresses are integral to its marketing. As spokesman Mike McNeil put it, **"Our business is female sex appeal, and in order to have that, you've got to be a female." To twist an old saying, Hooters sells the jiggle, not the steak.**

[Emphasis added]
Excerpted from Time Magazine web site:
http://www.time.com/time/magazine/1997/dom/971013/business.sexism_wil_be.html

CNN:

Hooters fighting back against EEOC allegations

December 25, 1995
Web posted at: 12:00 p.m. EST

ATLANTA, Georgia (CNN) -- Hooters, the racy restaurant chain, has been busy in the approximately six weeks since it went public with its campaign challenging the Equal Opportunity Commission's allegations of sexual discrimination...

... In addition to the EEOC complaint, Hooters also has garnered criticism in Chicago, where four men are suing for sexual discrimination. However, **the company, which hires men to work in the kitchen, contends putting men in the dining room would turn Hooters into just another burger and chicken joint. Hooters says the women, not the food, are the product,** making it legal to hire only female waiters ...

[Emphasis added]
Excerpted from the CNN web site:
http://www.cnn.com/US/9512/hooters_eeoc/index.html

WAVE
Women Against a Violent Environment
P.O. Box 15650, Rochester, NY 14615-0650
716-234-9709
wave@mooreresults.com

WAVE's Review of Hooters
by Barbara Kasper and Barbara Moore

Published as "Restaurant puts workers on display"
in the April 12, 1995 *Democrat and Chronicle* (Rochester, NY)

This is WAVE's - Women Against a Violent Environment - first restaurant review. We decided as a community service we would review Hooters, a restaurant chain which recently located in Rochester. **Several people had told us that the theme behind Hooters was really "harmless fun." It is, after all, a family restaurant, we were told. Since we don't fit the "humorless feminist" stereotype, some "harmless fun" at a family restaurant sounded pretty good to us.** Along with another WAVE member we went to Hooters one Monday for lunch.

Upon arrival, we studied the menu. It held double meanings that even non-feminists who have not had years of consciousness raising could recognize.

On the backside of the menu the intent of the restaurant was clearly spelled out: "Now the dilemma...what to name the place. Simple - what else brings a gleam to men's eyes everywhere besides beer and chicken wings and an occasional winning football season. Hence, the name -- Hooters -- it is supposed that they were into owls."

"Quick," one of us said, "write that down. And be sure to write down what the signs on the walls say." We read them off: **"Caution: Blondes Thinking; Hooters Waitresses are Flattery Operated." And there was another one that showed the outline of two breasts, shaped to look like a road caution sign that said "Bumps."**

Although we were sure everyone had realized we were feminists who had come to scope the place out, it was soon apparent that no one -- except our waitress -- was paying any attention to us. **All the male customers were like out of the Exorcist, with their heads spinning around at 360 degrees. Except for the male sporting events being broadcast from numerous big screen televisions, the only other thing that could be causing them to crane their necks like this had to be the Hooters Girls. In their bright orange short shorts and halter tops, they were hard to miss.**

These men were also watching a curious phenomena taking place at the entrance to the restaurant. **Some of the Hooters Girls were gyrating with hula hoops as the onlookers did their onlooking.** Maybe, making hula hoop performance a part of all waitresses' job descriptions would bring more respect to this line of work. We had a good laugh about how all of us -- college professors, librarians, neurosurgeons -- should be required to hula hoop on the job.

We received our food. As we tasted our small and over-priced portions, **we wondered how Hooters got to be so popular. (There are at least 150 Hooters restaurants in the U.S.) We concluded that Hooters has proven that making fun of women and using women's breasts to sell chicken wings and beer is financially rewarding.**

Since WAVE is always in need of money, we got to thinking about how we could reduce someone to a stereotype and make a restaurant chain based on that theme. What about a chain called "Geezers" that featured elderly waiters and waitresses? Or what about "Gimps" that hires people with disabilities to wait tables. Then there's Sambo's ... but, wait, that's already been done. Besides, didn't that

chain close down after a well organized boycott?

As we left we discussed the all-in-good-fun, family atmosphere Hooters promotes. This is the dangerous, very serious side to Hooters. Because Hooters has managed to mainstream the objectification of women, it seems so harmless. Women have always been made more physically visible (and therefore more accessible) than men, by everything from advertisements for liquor to the Playboy centerfold. Whether it's MTV or Calvin Klein, women's bodies sell.

While we did not see any men stuffing dollar bills down the Hooters Girls t-shirts, and none of the Hooters Girls were being manhandled, a friend of ours had a different experience. She visited the restaurant one weekend night and saw waitresses being grabbed, rubbed against and fondled. When our friend asked a Hooters Girl why she didn't report this customer behavior to the managers, the reply was, "It wouldn't do any good."

At Hooters, there is no penalty against ogling (and perhaps even grabbing). **The statement which prospective Hooters Girls are asked to sign asks they acknowledge that "the Hooters concept**

is based on female sex appeal and that the work environment is one in which joking and innuendo based on female sex appeal is commonplace." The last time we checked, being the object of persistent joking and innuendo of a sexual nature on the job was declared illegal by U.S. courts as it constitutes sexual harassment.

The policy the waitresses sign also states: "I do not find my job duties, uniform requirements or work environment to be offensive, intimidating, hostile or unwelcome." Much of the wording in this statement is often found in company policies which define sexual harassment. But sexual harassment doesn't exist in Hooters' world view. No means yes. It's a place where "boys will be boys" and sexual harassment becomes normalized.

The Working Women's Institute states that sexual harassment is the single most widespread occupational hazard women face in the workplace. **We believe that Hooters constitutes an atmosphere that legitimizes and invites sexual harassment.** Sexual exploitation should not be a condition of employment.

Call us humorless feminists if you must, but for our restaurant review with a scale of 1 to 4, with 4 stars being the highest, we give Hooters no stars at all.

[Emphasis added]
Excerpted from WAVE web site:
http://mooreresults.com/WAVE/hootrev.html

The Daily Illini Online, June 30, 2000:

Hooters: Not just for fun

To the editor:

I strongly object to your editorial published June 26 ("Hooters: It's just for fun"). As I said in the press release, and as I have repeated and will continue to repeat: **Restaurants like Hooters, which market and promote women as objects rather than human beings, promote the idea that women can be treated however men feel like treating them.**

I believe there is a direct correlation between the objectification that Hooters and other restaurants like them promote and events like those in Central Park, where women were sexually assaulted and raped by men. Most of these men did not have any priors. They were drunk and probably figured that there wasn't anything wrong with what they were doing. Neither did the crowds that gathered around them. Why? Because when society teaches us that women are nothing but objects at which to leer, grope and do with as men please, then why should they be stopped?

Unless of course you believed that women should not be treated as objects to play with whenever one is so inclined.

Ruth Wyman
president, Champaign County chapter of National Organization for Women

[Emphasis added]
Excerpted from The Daily Illini Online web site:
http://www.illinimedia.com/di/june00/june30/opinions/letters.html

From "Public Access" internet:

About 60 people protested the opening of "Hooters" in downtown Gainesville in late May. Here [referring to photo accompanying the article], Kat Smith walks past the outdoor area of the restaurant. Protesters carried signs saying "Hooters Mainstreams Sexual Harassment,"and "Sexism on the Menu" to protest the fact that female Hooters employees are required to wear revealing shirts and tiny shorts so the corporate chain can make money off of male customers. In a letter explaining the protest, **organizer Jessica Mills stated, "Because everyone knows that 'Hooters' is a popular slang for women's breasts, Hooters encourages the objectification of women. It's OK, and expected, for the male customers to ogle the waitresses and the ultimate effect is that the atmosphere at Hooters mainstreams sexual harassment."**

[Emphasis added]
Excerpted from the Alachua Freenet, a "public access" web site, which allows members of the community to post items of interest or concern:
http://www.afn.org/~iguana/archives/2000_07/20000702.html

Appendix I

Northeast Booster, Volume 52, Number 36, Week of October 11, 2000:

On the Opinion page:

Hooters not needed to put Perry Hall on map

Editorial

Should Northeast county residents give a hoot about the possibility of a Hooters restaurant being built on Belair Road in Perry Hall?

Yes, for a number of reasons.

The heart and soul of Perry Hall lies in its residents' dedication to making the area a wholesome place in which to raise a family.

Hooters is not a family restaurant.

Its reputation as a place where men may gawk at well-endowed waitresses wearing skin-tight clothing precedes any mention of its menu.

A hooters restaurant at the location a management company is reported to be considering – next to a proposed Safeway supermarket – would be entirely out of character with other businesses in the surrounding area and nearby churches and residences.

Allowing a Hooters would be an invitation for other establishments that push the limits of propriety to likewise seek to settle in Perry Hall.

Hooters fans may argue that no one is ever forced to step inside a Hooters. But the suggestive signage that accompanies a Hooters would be

unavoidable for passing motorists and families frequenting the nearby Safeway...

Letter to the editor:

No place for Hooters among Perry Hall families

This Hooters Restaurant is absolutely ridiculous. We worry about having too many automotive businesses in the area, but will consider having an establishment that promotes the exploitation of women. I will be (damned) if I am going to drive down the street everyday and see a Hooters and have to explain to my children why we can't go in there.

This is not a family type establishment. It ought to be clear just by the name of it. I am so upset by this. This should be put in the city or in a more urban area, not Perry Hall, where we moved to get away from crud like that. I am so irritated by Dennis Eckard's comment that it is not like a strip club and is not a bad place. I guess he would say that, he is a typical male. This sends a bad message to our kids. We've got enough to deal with with the entertainment industry. I don't need something like this in my back yard.

Linda Spivey,
Perry Hall

Appendix J

Pharmacy Corporation of America
12240 Kiln Court
Beltsville, Maryland 20705

June 21, 1996

Antonia K. Elkins
9 Fox Den Court
Reisterstown, MD 21136

VIA FEDERAL EXPRESS PRIORITY

Dear Toni,

It is with great pleasure that I offer you the position of I.V. Nurse Consultant(Educator/Marketeer) with the Pharmacy Corporation of America. You will be reporting directly to the Senior Pharmacy Manager, with a gross wage of $1,923.08 paid every two weeks. The mutually agreed upon start date is on or about July 8, 1996.

As discussed, you will be working autonomously with respect to developing the training program and setting your work schedule. You will be expected to impart the necessary knowledge to our students, maintaining their interest and encouraging mutual respect, as well as manifesting a personal dynamism as IV therapy needs are identified. Your role as trainer, educator, and liaison with nursing home staffs, physicians, and nursing facility operational management will be measured through a continued increase in IV referrals

and a positive rapport with these individuals in the LTC setting.

I cannot overemphasize the importance of your position and the need for your presence on a regular basis in the homes we service. As discussed, this will incur a significant amount of travel and field work. You will be reimbursed at the rate of $0.31 per mile for every mile traveled less the distance from your home to the pharmacy and back which is approximately 80 miles. the

(800) 336-7874
(301) 210-3670
Fax: (800) 879-4329

[second page]
mechanism for reimbursement will be a standard expense report completed weekly. You will also be reimbursed for any other job-related expenses.

Enclosed is the PCA IV Certification Manual (instructor and student copies), a copy of PCA's IV Policies and Procedures for Long Term Care, and your tape. I would appreciate your working on the program as expeditiously as possible so that you'll be that much ahead when you begin on the 8th.

Enclosed is some preliminary benefit information as well as the documentation required for your drug testing. As you know, employment is contingent on your successful passing of this test. Pam Rogers, our administrative assistant, will handle your formal orientation which will be taken care on your first day

of work. If you have any questions in general or regarding any of the enclosed, please feel free to call me toll free at 1-800-336-7874. In addition, you will probably work with Judy Abella, R.N., Nurse Consultant for Beverly Enterprises. I will set this up with Judy Buchanan, her manager, who you met yesterday. Susan Stevens and I will make ourselves available to you as well to assist and be a personal resource.

Toni, I believe that you will find this to be a challenging and stimulating position and that you have the ability and experience to make a significant contribution to o9ur operations. I look forward to working with you and welcome you into the PCA family. Please sign one copy of this letter and return it to me, along with your completed application, in the enclosed self-addressed stamped envelope at your earliest convenience.

Sincerely,
/s/Barry
Barry Roberts, R.Ph., M.B.A.
Sr. Pharmacy Manager

/s/ Antonia K. Elkins _____ 6/24/96
I accept this offer Date

Encls./as stated
cc: Pam Rogers

Appendix K
(" " = handwritten by Ms. Elkins)

Pharmacy Corporation of America
2138 Industrial Parkway
Silver Spring, Maryland 20904

AGREEMENT FOR WORK HOURS

Date "6/24/96"
Name "Antonia K. Elkins"
Position "IV Nurse Consultant"
Department "Pharmacy"

I "Antonia K. Elkins" , agree to work the following Flex-time schedule. My regular hours will be "40 hours per week, schedule to be arranged by myself. Drive time as work time understood". Any deviations will be reported and approved by my supervisor.

COMMENTS:

/s/ Antonia K. Elkins, RN — Employee

/s/ Pam Rogers — Supervisor

NOTE: IF YOU WISH TO CHANGE YOUR FLEX-TIME SCHEDULE, A NEW AGREEMENT MUST BE COMPLETED AND SIGNED.

(800) 336-7874
(301) 680-0003
Fax: (800) 879-4FAX
Fax: (301) 680-9219

Appendix L

Analysis of Travel Vouchers
During the Period of Ms. Elkins' Employment

	Elkins	Swanson	Harjivan
Total Miles, week ending 7/13/96 through week ending 10/25/96	2779	2780	4380
Average per Week, same period (16 weeks)	173	174	302
Number of Weeks driving over 300 miles, same period	5	6	5
Number of Weeks driving over 400 miles, same period	4	0	4
Number of Weeks over 500	2	0	4
Number of Weeks over 600	1	0	0

Appendix M

10/18/9

Antonia K. Elkins, RN
9 Fox Den Ct.
Reisterstown, MD 21136
410-833-6476

Keith Anderson
Pharmacy Corp. of America
12240 Kiln Ct.
Beltsville, MD 20705

Dear Mr. Anderson,

I can no longer continue to work for you. At my three month evaluation on 10/15/96, a grade of satisfactory was issued.

When I accepted the position a scant three months ago, my agreement with the corporation was that I would be responsible for setting my own schedule, that I would work out of my home when not at appointments/visiting the Homes, and that driving time to the Homes would be considered work time due to the excessive distances of the Homes. An overnight trip was to fall roughly once a month, weekly hourly requirement to be between 40 and 50 hours per week. The employment was to be year to year, renewable at your option, which according to our understanding would be exercised by you principally on the basis of whether there had been a rise in IV revenue due to my efforts in the preceding year. Your "new" job description which you have sought to impose, breaches my contract with your company, viz.: you seek to

require the elimination of driving time as work time and you wish to require me to come to the PCA office at any time, unreasonably and at your whim (as you already have done several times in the past), which is directly contrary to my contract. My home was agreed to be my working base, of course, and to this end communications equipment, as you know, was installed in my home office. Your continued questioning of my child care arrangements, also, is not only a breach of the contract, but discriminatory and illegal. There has also been, as you well know, sexual harassment of me; and I am unable to say at his time whether your breach of contract has been occassioned by my resistance solely or by corporate stupidity as well.

Also, I demand preservation of my voice mail message to Carl Prince on the eve of 10/17/96; I forewarn you that destruction of said message will raise a presumption against you concerning your bona fides in this matter. It is important that the tone, spirit and specific wording of said message be preserved.

/s/ Antonia K. Elkins RN, BA
Antonia K. Elkins, RN, BA

I will be honoring my commitments of next week so as to not inconvenience the two Homes which I had scheduled for 10/21, 10/23 &24/96.

Appendix N

Pharmacy Corporation of America
1123 Pear Street
Brockton, Massachusetts 02401

October 22, 1996

Antonia K. Elkins, RN
9 Fox Den Court
Reisterstown, MD 21136

Dear M. Elkins:

We are in receipt of your letter to Keith Anderson dated October 18, 1996 in which you voluntarily resigned your employment. PCA accepts your resignation effective October 23, 1996.

Your letter contained allegations. Each of those allegations have been investigated and are addressed below.

First, you were an employee at will. You did not have a contract with PCA. The letter offering you a position and setting forth some of the details of our position does not constitute a contract of employment. In fact, the application of employment you completed and the co-worker handbook both specifically set forth that the employment relationship between you and PCA is at will.

Second, it is completely appropriate that Mr. Anderson may have different performance expectations than his

predecessor. Indeed, you were still working out of your home and setting your own schedule; however, Mr. Anderson had specified that you must be available 8 am - 5 PM Monday through Friday as discussed in your 90 day performance evaluation. This does not mean you have to be available to go to the pharmacy, but available to be contacted by phone or beeper. Sometimes it was necessary for you to go to the pharmacy, but this was kept to a minimum. You were still expected to impart the necessary knowledge to your students maintaining their interest and encouraging mutual respect. You were still being measured by the increase in IV referrals and a positive rapport with our customers. Finally, it was expected that a significant amount of travel and field work would be required in this position as stated in your offer letter.

Third, your assertion that Mr. Anderson discriminated against you by his continued questioning of your child care arrangements is not true. Mr. Anderson never questioned your child care arrangements, however, on at least two occasions you stated to him that child care issues prevented you from following a specific directive. Mr. Anderson expects all co-workers to meet the requirements of their jobs.

(800) 966-3000
(508) 588-4600
Fax: (508) 587-3645

[second page]
Fourth, your assertions of sexual harassment are unfounded. The incident to which you referred was a

suggestion by Mr. Anderson that you and another co-worker go to dinner at Hooter's when you were all in the field for a business meeting. Mr. Anderson mad the comment in jest among kidding going on among all parties. Indeed, you had dinner elsewhere.

Finally, you alleged that Mr. Anderson just didn't like you and preferred that you were not working for him since it was not he who hired you. This allegation is simply not supported by the 90 day evaluation received by you from Mr. Anderson. He rated you overall between Very Good and Satisfactory. He listed your strengths as: IV Knowledge, Clinical Knowledge, and Quality of Work. He listed areas needing improvement as: Increase Communication with Supervisor and Customers, Manage Time Wisely, Market the IV Program per the IV Initiative.

I am enclosing with this letter a list of PCA property which you need to return as well as information on benefits. Please contact me to arrange for the return of this property a soon as possible.

Sincerely
/s/James W. Brennan
James W. Brennan
Human Resources Director

Cc: Keith Anderson

Appendix O

Keith –
last week in Richmond; Tony & Susan at this meeting; Carl Prince, Regional Nursing for Beverly. Carl requested meeting to promote IV services to all his directors. Susan called Keith from her car. Janice R. was with Keith. Carl stopped Tony during her presentat because she was promoting 8-h IV class after he told her he wanted a 3 day course. Carl left Keith a voicemail saying that we already discussed this, why is she opening it up again.

Thurs afternoon Keith called Susan he began to discuss above issues. He told Susan that he's not going to work well w/ her. Asked her to come in Fri AM. Tony called Fri AM. Said she didn't know if she could come in. Told him that babysitter wks 40 *[indecipherable]*. She volunteered it. Keith did not ask her re: babysitter.

(About a month ago Tony told Keith she had to get home by a certain hour to relieve babysitter.)

She asked why she had to come in. Keith told her. She wanted to do it on the phone. Keith said let's reschedule.

Keith rec'd feedback from Carl Prince about her style.
* DON LeeAnn Storm, Sleepy Hollow – gave feedback.

4-5 hr. drive to furthest facility.

[second page]

After Reg. meeting, Keith discussed marketing w/ her. No discussion re: hrs, travel, overnights. Her 1st day on board, Keith took her out to lunch. Wanted her to feel comfortable. Acknowledged that she *[indecipherable]* w/ her. Told her he heard good things about her. Jay told Keith to make sure he contacted Tony.

Richmond in August; Keith said let's go to Hooters. Was kidding around. Tony said she didn't want to go there. They went to Lonestar instead.

Appendix P

Susan Stevens - don't work closely normally.
last week together in Richmond
DON meeting IV program.
The Nurse Consult. Carl Prince, & Tony didn't see eye to eye. Didn't like the tone of her voice. Asked Susan to listen. She said that's the way she always is. Direct, not flexible, snippy. Asked him to voicemail Keith & his boss, Joe O' Donell.
Issue: length of IV classes; differing opinion. Power struggle. She called him on it in a roomful of people.

Susan [Keith] has brought up problems w/ her re:
her schedule - insists on working only 40 hrs
doesn't want to travel
doesn't want to do overnights
Keith wants her to come into office.
Yea, there've been changes, but nothing that's a problem - He's more hands-on; more involved; Changes are positive. He doesn't he doesn't direct you but he had his ideas too.
We implement ideas together. He's trying to enhance our job, not tell us what to do.

Keith is same way - "my way is right way". Those two just didn't click.
August - Richmond - Susan put on *[indecipherable]* for Beverly customers.
Keith suggested they go to Hooters. Keith said the wings were excellent at Hooters. Let's go there.
Went to Lonestar.

Supreme Court, U.S.
FILED
JAN 11 2001
CLERK

No. 00-792

IN THE

Supreme Court of the United States

ANTONIA J.H. ELKINS,

Petitioner,

v.

PHARMACY CORPORATION OF AMERICA, INC., *et al.*,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF IN OPPOSITION

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COUNTER-STATEMENT OF QUESTIONS PRESENTED

I. Does the decision by the Court of Appeals denying the Petitioner's claim of sexual harassment on the basis that a single suggestion to go to a Hooters Restaurant could not support a finding of a hostile work environment conflict with relevant decisions of the Supreme Court?

II. Does the Court of Appeals' conclusion that appellants' claims "amount to nothing more than a nonactionable trivial discomfort endemic to employment" or are not supported by the evidence merit further review by the Supreme Court?

STATEMENT PURSUANT TO RULE 29.6

Pharmacy Corporation of America, Inc. ("PCA"), the respondent, at the time of the filing of the Complaint was a wholly owned subsidiary of Beverly Enterprises, Inc., a publicly owned corporation. Subsequent to the events alleged in the complaint, PCA merged with Capstone Pharmacy Services, Inc. and the surviving entity was named Pharmerica, Inc. Pharmerica, Inc. is a wholly owned subsidiary of Bergen Brunswig Corporation, a publicly owned corporation.

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TABLE OF CITED AUTHORITIES

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Mendoza v. Borden, Inc., 195 F.3d 1238 (11th Cir. 1999) 15

Cited Authorities

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Oncale v. Sundowner Offshore Services, Inc., 523 U.S. 75 (1998) 15

Page v. Bolger, 645 F.2d 227 (4th Cir.), *cert. denied*, 454 U.S. 892 (1981) 16, 18

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COUNTER-STATEMENT OF THE CASE

A. Procedural Background

The Petitioner, Antonia J.H. Elkins ("Elkins") filed this case on August 19, 1998 in the United States District Court for the District of Maryland, Northern Division against the Respondents, Pharmacy Corporation of America ("PCA"), now known as Pharmerica, Inc. and G. Keith Anderson. ("Anderson"). The complaint contains four counts, including a Title VII claim based on sexual harassment, sex discrimination and retaliation. The other claims were for breach of contract, abusive discharge, and tortious interference with contract. All of Elkins' claims arose out of her employment by PCA as an IV-Nurse. The essence of Elkins' complaint was that Anderson, her supervisor, in the presence of another employee, suggested that the three of them eat dinner at a Hooters Restaurant in Richmond, Virginia where they were on company business. Elkins rejected the suggestion, and claimed that thereafter Anderson retaliated against her on the basis of that rejection, and that ultimately she was forced to resign her position. At the conclusion of discovery, the District Court granted PCA's and Anderson's motion for summary judgment as to all counts. See Appendix B to Petition for Writ of Certiorari. The Fourth Circuit Court of Appeals affirmed the District Court's ruling and denied Elkins' petition for rehearing and rehearing en banc. See Appendices C and D to Petition for Writ of Certiorari.

B. Facts

Elkins was hired by PCA as an IV-Nurse Consultant on or about July 8, 1996 and voluntarily resigned on October

18, 1996. Elkins had responded to PCA's advertisement seeking candidates for the position. During her employment, Elkins was assigned to the PCA pharmacy located in Beltsville, Maryland (the "Beltsville Facility"), and Elkins' immediate supervisor was Anderson, the Beltsville Facility pharmacy manager.

At the time of her employment with PCA, Elkins was provided with an Employee Handbook that set forth all of PCA's applicable employee rules, regulations and policies, including but not limited to PCA's sexual harassment policy. Elkins' employee file contained an acknowledgment that she had received a copy of the Employee Handbook. The Employee Handbook also explicitly advised all employees that they were at-will employees and that only the President of PCA could enter into an employment contract with an employee on behalf of PCA.

At all times Elkins was an at-will employee, who did not have any employment contract with PCA. At all times Elkins was treated as an exempt employee for purposes of the wage and hour laws. Accordingly, Elkins was paid by salary; she did not receive overtime pay, nor was she required to work a set period of time to be entitled to her salary, provided that she accomplished her job duties. At no time while Elkins was employed by PCA was her compensation reduced or in any way modified because she worked less than forty (40) hours in a workweek.

Elkins, like several other exempt employees at the Beltsville Facility, was permitted to work from her home, subject to certain terms and conditions. PCA exempt employees at the Beltsville Facility who were permitted to work outside of the Beltsville Facility on job-related matters

were expected to be available to the Beltsville Facility management by the company-provided beeper between 8:00 a.m. and 5:00 p.m., Monday through Friday, and at such other times as may be required to provide the necessary services to PCA's clients, and to be present for meetings and conferences at the Beltsville Facility as required.

Elkins' position as an IV-Nurse required her to travel to PCA facilities in Maryland, Virginia, West Virginia and the District of Columbia. Again, Elkins like all other exempt employees at the Beltsville Facility, was compensated for her travel expenses at the rate of $0.31 per mile less the distance from her home to the Beltsville Facility.

On August 5, 1996, Elkins, Anderson and Susan Stevens ("Stevens") were in Richmond, Virginia for company business. While waiting for Elkins to arrive at their hotel in Richmond, Anderson mentioned to Stevens that he liked chicken wings and wondered if there was a Hooters restaurant in Richmond since they were well known for their chicken wings. Stevens was not offended by the suggestion and stated that she would go to the front desk and ask if there was a Hooters in Richmond. Elkins encountered Stevens in the hotel lobby, where Stevens told Elkins about Anderson's suggestion to go to Hooters. Elkins told Stevens that she was not going to eat at a restaurant called Hooters. Elkins claims that she later confronted Anderson and repeated what she had told Stevens. The three eventually ate at a Lone Star Steakhouse. Other than Stevens and Anderson, prior to her resignation, Elkins never discussed the suggestion to dine at Hooters with any other employees, any other member of the PCA management team, or anyone in the PCA Human Resources Department.

On August 27, 1996, Anderson called Elkins at home and insisted that she meet with him in the Beltsville Facility on short notice. During his meeting with Elkins, Anderson's attention was diverted on more than one occasion to deal with other matters, both work related and non-work related; on September 18, 1996, while Elkins was at the Beltsville Facility to conduct some training, Anderson told her for the first time that there was a 7:00 p.m. meeting that evening; Anderson also asked Elkins if she had a "babysitting problem"; on October 1, 1996, Elkins appeared at the Beltsville Facility for a scheduled meeting, after she arrived she was told that the meeting was planned for a different location, but that it had been cancelled.

On October 7, 1996, Elkins was to receive her 90-day evaluation. On her way to the meeting, Elkins was called by Anderson and told that he would be late for the meeting because of a previously scheduled conference. After waiting for forty-five minutes, Elkins was told by Anderson that the meeting needed to be rescheduled. Subsequently on October 15, 1996, Elkins received an above-average performance evaluation.

On October 11, 1996, a director of nursing at a nursing home asked Elkins about starting quarterly enteral quality assurance. Elkins believed, and rightly so, that enteral quality assurance was not related to IV therapy, not within the scope of her job description and would be a full time job in itself. In addition, Elkins (erroneously) believed that Anderson told the particular director of nursing that Elkins was going to conduct the quarterly enteral quality assurance, without telling Elkins and while knowing that she could not accomplish it along with her regular job duties, in an effort to make Elkins look bad. Elkins, however, was never required

by Anderson or anyone else at PCA to conduct any enteral quality assurance, which was ultimately performed by PCA staff from Massachusetts.

On October 17, 1996, Elkins attended a meeting with twenty directors of nursing. During a presentation being given by Elkins, Carl Prince, a nurse consultant, stood up and said that he wanted only three-day training courses, as opposed to two-day courses, and that he had already expressed this desire to PCA. Elkins then fielded inquiries about this topic for the next hour and a half. Elkins believed that Anderson intentionally refrained from telling her about Mr. Prince's desire for three-day courses so that Elkins would embarrass herself at the meeting.

On October 17, 1996, Anderson left a message for Elkins that he wanted her to come into the office the next day to discuss some things. On October 18, 1996, Elkins called Anderson to discuss the issues. Anderson told Elkins that he wanted to see her in person. Elkins responded that if she reported to the office, she would not have time to prepare to teach classes the next week. Elkins claims that Anderson asked her if she was having trouble with babysitting. Elkins claims that Anderson told her that he could change the terms of her hire at any time, that he did not consider drive time to be work time, and that he expected Elkins to be available to come into the office Monday to Friday between 8:00 a.m. and 5:00 p.m.

On October 18, 1996, Elkins resigned from her employment with PCA by faxing a letter of resignation to Anderson after the close of business. Prior to submitting her letter of resignation on October 18, 1996, Elkins never followed PCA's outlined procedures with regard to filing a

complaint of sexual harassment by a fellow employee. Upon receipt of her letter of resignation, PCA immediately conducted a thorough investigation of the allegations and concluded that they were unfounded. A letter advising Elkins of the outcome of the investigation was mailed to her on October 22, 1996.

C. Sup. Ct. Rule 15.2 Petitioner's Misstatements of Law and Facts

The Petition is replete with misleading representations of the facts in the record, which prevents this Court from assessing the propriety of the decisions of the lower courts.

Throughout her Petition, Elkins claims that her ability to work from home close to her children was important to her and a consideration that she alleges was altered by Anderson. For example, in the opening of her Questions Presented for Review, the Petitioner states: "She accepted employment with the corporate Respondent upon terms, carefully negotiated by her and acknowledged by the company, **which would allow her to perform her job without interfering with her ability to devote time to her young children.**" Petition for Writ of Certiorari, p. i (emphasis added) (hereafter "Pet. For Cert.") The record indicates that Elkins was aware of the travel required in the job from the very beginning. The letter by which she was offered employment specifically states: "I cannot overemphasize the importance of your position and the need for your presence on a regular basis in the homes we service. As discussed, this will incur a significant amount of travel and field work." Pet. for Cert., App. 2j.

Elkins' next misleading statement concerns her alleged complaints of the Hooters incident. She states in her Petition that she "refused the invitation [to Hooters] and vigorously complained to her supervisor (Anderson himself, initially, and later to the corporate human resources director) . . ." Pet. for Cert., p. 6. In fact, aside from her initial refusal of the invitation, Elkins never again complained to Anderson and did not mention the incident to the human resources department until after her resignation more than three months later.

Elkins again misstates the facts when she claims that she "was entitled to suspect that the oversights [on the part of Anderson not to inform her of changes in meeting times and places] were deliberate in view of the fact others were given the information they needed." Pet. for Cert., p. 12. Nothing in the record supports this statement. The record does, however, include the deposition of another PCA employee, Ms. Stevens, who testified that Anderson forgot to tell her that meetings had been cancelled.

Another blatant example of a factual misstatement can be found in the Petitioner's attempt to show that she was singled out for mistreatment. She states: "Interviews of long-term employees (similarly situated males except for one female, Ms. Stevens, who had not complained about the invitation to Hooter's) established that Anderson rarely if ever forgot to give them information; none could recall a specific incident." Pet. for Cert., p. 15. This statement is curious because the Respondent is aware of no interviews other than Ms. Stevens and Janice Rutowski, who worked in the corporate human resources department and did not have daily contact with Mr. Anderson. Nor is there anything in the record to support Elkins' claim that she "consulted with

other employees, and found out that she had been singled out for this treatment [not to count drive time as work time]." Pet. for Cert., p. 16.

Finally, in an attempt to provide the Court with the requisite "ultimate employment action" taken against her, Elkins draws an inappropriate conclusion from a misleading statement of the facts. After her resignation, Elkins went to a seminar that had been scheduled prior to her resignation — for the admirable reason to fulfill her commitment to her customer. Mr. Anderson, however, did not arrange for the necessary materials to be sent for the seminar because he did not want, nor expect, Elkins, who was no longer employed by PCA, to present a seminar on its behalf. The Petitioner asserts this reasonable action by Anderson implies that he intended to fire her. "Anderson indicated, when contacted by phone, that he did not want her to do any more work for the company — **thus, he revealed that it had been his intention to terminate her employment, establishing that an ultimate employment action had occurred.**" Pet. For Cert., p. 21 (emphasis added). This unreasonable, far-reaching inference is typical of the Petitioner's view of all of the events that occurred during her employment with PCA.[1]

---

1. In the Petioner's Appendix, she has included many documents that were not part of the record below and which have little or no probative value to the issues in this case. While Sup. Ct. R. 14.1(i)(vi) permits a petitioner to include any material that it believes essential to understand the petition, such material should at least have some probative value and be otherwise the kind of information or documentation that would be admissable at a trial. Because the documentation included by the Petitioner in Appendices G, H and I do not meet such standard, they should be disregarded by the Court in its consideration of the Petition.

REASONS FOR DENYING THE WRIT

The record in this case supports the Fourth Circuit Court of Appeals' holding that Elkins could establish no valid claim for sexual harassment. The applicable law is clear that a single incident, like the suggestion to dine at Hooters, cannot meet the requirement that the alleged conduct be sufficiently severe or pervasive to alter an employee's conditions of employment such as to create a hostile work environment. In affirming summary judgment for PCA, the court of appeals properly performed its function by concluding as a matter of law that based upon the facts of this case, no reasonable jury could find that Elkins' claim constituted a hostile work environment.

Second, the court of appeals properly concluded that no adverse employment action was taken against Elkins. None of the acts complained of by Elkins constitutes the kind of ultimate employment decisions that would have had an immediate effect on Elkins' employment relationship with PCA, an essential element of any retaliation claim. In addition, the record is devoid of any evidence that any of the actions allegedly taken by Anderson against Elkins were the result of her rejection of his suggestion to go to Hooters or any evidence that Elkins was treated any differently than other consultants under Anderson's supervision.

The decision of the Fourth Circuit Court of Appeals that the Petitioner seeks this Court to review is not in conflict with any other court of appeals on the issues presented. Nor does the court of appeals decision depart from the accepted and usual course of judicial proceedings, as to call for an exercise of this Court's supervisory power. Indeed, the Petition makes no such claim. Moreover, there has been no ruling in this case deciding an important question of federal law that has not been, or should

be, settled by this Court. The Petitioner seeks this Court to review and reverse the decision of the court of appeals that the facts alleged cannot support a Title VII violation of any kind.[2] Not only are the decisions of the lower courts correct and well-reasoned, there is no issue in this case that justifies the extraordinary step of this Court exercising its power to review.

I. There was No Hostile Work Environment

The court of appeals properly held that there was no valid claim for sexual harassment based upon a hostile work environment theory. The single incident of which Elkins complained cannot support a finding of a hostile work environment.

> To prove a hostile work environment claim under Title VII, the plaintiff must show (1) that the conduct in question was unwelcome, (2) that the harassment was based on sex, (3) that the harassment was sufficiently pervasive or severe to create an abusive working environment, and (4) that some basis exists for imputing liability to the employer.

Paroline v. Unisys Corp., 879 F.2d 100, 105 (4th Cir. 1989) *vacated in part on other grounds*, 900 F.2d 27 (4th Cir. 1990) (en banc).

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2. The Petition references, as a sidelight, the dismissal of the Petitoner's state law claims. Clearly, none of those claims involve questions of federal law that require review from this Court. Nor does the dismissal of those claims depart from accepted and usual judicial proceedings so as to call for this Court's review.

In order to state a prima facie case of hostile work environment sexual harassment, a plaintiff must set forth conduct by the defendant, that "was sufficiently severe or pervasive to alter the plaintiff's conditions of employment and to create an abusive work environment." *Spicer v. Commonwealth of Virginia Dep't of Corrections*, 66 F.3d 705, 710 (4th Cir. 1995) (en banc). "Conduct that is not severe or pervasive enough to create an objectively hostile or abusive environment — an environment that a reasonable person would find hostile or abusive — is beyond Title VII's purview." *Harris v. Forklift Sys., Inc.*, 510 U.S. 17, 21 (1993).

The court of appeals held that the single suggestion of going to Hooters could not support a finding of a hostile work environment because the alleged harassment amounted to a single remark that was neither severe nor threatening and did not interfere with Elkins' work performance. Elkins continues to argue in this Court, that her hostile work environment claim is not limited to the single suggestion to dine at Hooters, but also included other alleged events. These events, however, relate to the retaliatory actions allegedly taken by Anderson after Elkins rejected his suggestion. For example, Elkins' allegation that Anderson failed to advise her about the cancellation of a meeting cannot be the basis of a sexual harassment claim, nor could his insistence that she appear in his office on certain occasions for work-related activity. These remaining allegations of wrongdoing form Elkins' assertion that she suffered a tangible change in employment status. None of these allegations constitute any evidence of an incident of sexual harassment.[3]

---

3. Petitoner claims her petition should be granted because it raises a novel issue, whether alleged retaliation can be used as a basis for proof of her claim of sexual harassment. However, there is

(Cont'd)

When evaluating the conduct in the instant case to make a determination of whether or not it was severe or pervasive enough to fit within Title VII, the Court must examine the totality of the circumstances, including 1) the frequency of the discriminatory conduct; 2) its severity; 3) whether it is physically threatening or humiliating, or a mere offensive uttering; and 4) whether it unreasonably interferes with an employee's work performance. *Hopkins v. Baltimore Gas & Electric Company*, 77 F.3d 745, 753 (4th Cir. 1996).

Applying these factors to Elkins' claim, the only allegation of discriminatory conduct is the one alleged incident involving an invitation to dine at Hooters Restaurant. The invitation did not even come from Anderson directly. Anderson suggested that he, another female co-worker and the plaintiff have dinner at Hooters Restaurant. When the other female co-worker passed on the suggestion to Elkins, outside of the presence of Anderson, Elkins declined. The dinner invitation was in no way physically threatening or humiliating. At worst, it was in poor taste, although the other female co-worker did not think so. Anderson did not make any suggestive remarks to either Elkins or the other co-worker during the time of the alleged incident. Finally, the alleged conduct occurred while three co-workers were meeting to eat together while travelling on company business. The alleged conduct caused no interference with Elkins' work performance.

(Cont'd)
nothing novel about the issue. In establishing whether or not sexual harassment exists, courts are not permitted to consided non-sexual or non-gendered related comments or acts. *See Penry v. Federal Home Loan Bank of Topeka*, 155 F.3d 1257 (10th Cir. 1998); *Gupta v. Florida Board of Regents*, 212 F.3d 571 (11th Cir. 2000).

The court of appeals simply and correctly performed its function under Rule 56 by holding that as a matter of law, Elkins' claims did not constitute sexual harassment. In doing so the court properly found that no reasonable jury could find that Elkins' claims were sufficient to support a claim of a hostile work environment. That decision is consistent with its decision in *Hartsell v. Duplex Products, Inc.*, 123 F.3d 766 (4th Cir. 1997).

> But the claims propounded by Hartsell — even assuming them all to be true — are so trivial, so isolated, and so far from the paradigmatic case of sexual harassment, that summary judgment was clearly appropriate. Hartsell has produced evidence that the salespeople at Duplex — one of whom was female — were at times difficult to work with, insensitive, immature, and even insulting. Even assuming the truth of this evidence, and viewing the inferences therefrom in the light most favorable to Hartsell, she is not entitled to try her case. n6
>
> n6 Hartsell's theory would preclude the entry of summary judgment in any sexual harassment case. Here there are no questions of fact – we reject her claim despite our assumption that her allegations are true.

Id. at 773. As the court noted in *Hartsell*, under Elkins' theory, summary judgment would not be appropriate in any sexual harassment case. The lower courts properly rejected her claim despite assuming her allegations were true.

The Petitioner questions whether the court of appeals decided this case in contradiction to its own previous holding in *Beardsley v. Webb*, 30 F.3d 524 (4th Cir. 1994). The obvious answer is NO. In the instant case, the court determined that no reasonable factfinder could find that the conduct of which the Petitioner complained was sufficiently severe and pervasive to make out a sexual harassment claim. The fact that the court of appeals in *Beardsley* approved the district court's decision that submitted to the jury the question of the sufficiency of the severity and pervasiveness of the conduct alleged does not mean that its decision in this case contravenes *Beardsley*. The alleged misconduct in *Beardsley* was far worse that the allegations in this case. Those allegations included persistent name calling, shoulder rubbing in front of the plaintiff's husband, questions about her underwear and unjustified accusations of an affair with a co-worker. *Id.* at 528.

The conduct alleged by Elkins in the instant case is simply not severe enough so that a reasonable person would find the environment to be hostile or abusive. *See Harris*, *supra*. While Elkins may have been offended by Anderson's choice of restaurant, co-workers may not always be sensitive to other's perceptions. "Title VII is not a guarantee of refinement and sophistication in the workplace, it prohibits only harassing behavior that is so severe or pervasive as to render the workplace objectively hostile or abusive." *Hartsell*, at 773.

Not only is the decision by the court of appeals correct, it is consistent with the rulings of other circuit courts and not in conflict with any other circuit court opinions. Indeed, there are many cases where the alleged conduct was far more repeated, severe and personal, and still, the courts found that

no claim for sexual harassment existed. *See Mendoza v. Borden, Inc.*, 195 F.3d 1238,1246 (11th Cir. 1999); *Shepherd v. Comptroller of Public Accounts of Texas*, 168 F.3d 871, 872-875 (5th Cir. 1999); *Quinn v. Green Tree Credit Corp.*, 159 F. 759, 768 (2d Cir. 1998); *Adusumilli v. City of Chicago*, 164 F.3d 353, 357 (7th Cir. 1998); *Sprague v. Thorn Americas, Inc.*, 129 F.3d 1355, 1365-66 (10th Cir. 1997); *Galloway v. General Motors Serv. Parts Operations*, 78 F.3d 1164, 1167-68 (7th Cir. 1996); *Black v. Zaring Homes, Inc.*, 104 F.3d 822, 823-24 (6th Cir. 1997).

Finally, the decision of the court of appeals is clearly consistent with the decisions of this Court. In *Oncale v. Sundowner Offshore Services, Inc.*, 523 U.S. 75 (1998), this Court held that:

> Title VII does not prohibit all verbal or physical harassment in the workplace; it is directed only at "*discrimination* . . . because of . . . sex." We have never held that workplace harassment, even harassment between men and women, is automatically discrimination because of sex merely because the words used have sexual content or connotations. "The critical issue, Title VII's text indicates, is whether members of one sex are exposed to disadvantageous terms or conditions of employment to which members of the other sex are not exposed."

Id. at 81. The single invitation to dine at Hooters by Anderson did not constitute such discrimination, and accordingly, the petition should be denied.

II. There was No Ultimate Employment Decision

The Petitioner seeks review based on her allegation that the lower courts failed to find that the Respondents refusal to count drive time as work time was an ultimate employment decision. Again, this claim is not a basis for this Court to review this case. More importantly, the lower courts were absolutely correct in so holding.

In order to state a claim for retaliation, Elkins had to establish that 1) she engaged in protected activity; 2) her employer took adverse employment action against her; and 3) a sufficient causal connection existed between her protected activity and her employer's adverse employment action. *Hopkins v. Baltimore Gas & Electric Company*, 77 F.3d 745, 753 (4th Cir. 1996); *see also McNairn v. Sullivan*, 929 F.2d 974 (4th Cir. 1991). Elkins failed to prove the second and third elements of the claim.

Adverse employment action has been defined as "ultimate employment decision" as opposed to "interlocutory or mediate decisions having no effect upon employment conditions." *Page v. Bolger*, 645 F.2d 227, 233 (4th Cir.), *cert. denied*, 454 U.S. 892 (1981); *see also Ward v. Johns Hopkins University*, 861 F. Supp. 367 (D.Md. 1994) and *Raley v. Bd. of St. Mary's County Comm'rs*, 752 F. Supp. 1272 (D.Md. 1990). There was no adverse employment action — or ultimate employment decision — taken against Elkins.

The Petitioner cannot dispute that she was an exempt salaried employee. As such, she was treated just as other similarly classified employees were. She received her salary without regard to the number of hours-above or below

forty-worked in a week. Furthermore, Elkins' allegation concerning drive time, as work time is particularly peculiar for it was made clear to her at the time of her hire that she was to "incur a significant amount of travel and field work." Pet. for Cert., App. 2j.

Likewise, Elkins' position that drive time had to be considered work time in order for her to be able to complete the required 40-50 hours of work per week has no merit. Elkins says that it is not an issue of compensation but one of how her work time was spent. Again, Elkins fails to see the lack of merit in her position. As an exempt salaried employee she received the same amount of compensation whether it took her 20 or 60 hours per week to perform her job duties. She now tries to complain that without counting drive time it would take her an enormous number of hours to perform her job duties. The reality is simple — Elkins knew at the time of her hire that there was a significant amount of travel and fieldwork required of her position. With that knowledge she accepted the position and performed her duties for over three months. It doesn't matter whether her drive time was considered work time or not, because either way she still had to perform her job duties. There is no allegation that Anderson or anyone else at PCA increased Elkins' responsibilities such that it was any more difficult than it had been for her to perform her functions as an IV-Nurse. Even if Anderson did tell Elkins that drive time was not included in work time, it cannot amount to a tangible change in employment status because of her treatment as an exempt employee. Indeed, the burden is on the Petitioner to show that the Respondents compensated her differently after the alleged declaration not to count travel time as work time. The Petitioner has no such evidence to produce to satisfy that burden.

The Petitioner suggests that the court of appeals narrowly interpreted its decision in *Page v. Bolger*, and thus merits review by this Court. The mere fact that the Court suggested that there were many kinds of events that may give rise to an "ultimate employment decision", does not alter the fact that such events must have a significant adverse effect on the employee. None of the complaints raised by Elkins meets that standard. Indeed the Petitioner can point to no case where a court has held such alleged acts to have given rise to a claim for retaliation. All that the Petitioner has said repeatedly in the district court, in the court of appeals and again in this Court, is that I believed I was hurt by Anderson's actions and therefore retaliation existed. That is not enough to support the burden that Elkins had in this case. There is no grounds for this Court to grant the writ as it relates to this claim.

III. The Petitioner Cannot Raise New Issues in This Court Now.

For the first time in her Petition, Elkins questions whether or not PCA met its duty to protect Ms. Elkins from sexual harassment or did it assist in her termination. This issue was never raised before the court of appeals and therefore does not present a proper consideration for this court.

Notwithstanding her tardiness in raising the issue, it requires a brief response. PCA had a procedure in place to be followed in the event an employee wished to lodge a complaint. Elkins never followed the PCA procedures to complain about Anderson's conduct. In fact, PCA did not become aware of Petitioner's allegation of sexual harassment until after she resigned from her employment. At that time,

PCA investigated the allegations and made the appropriate conclusion that no harassment or discrimination occurred. It can hardly be said that PCA assisted in her termination.

CONCLUSION

For the foregoing reasons, Respondents respectfully request that this Honorable Court deny the Petition for Writ of Certiorari.

Respectfully submitted,

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(3)

Supreme Court, U.S.
FILED
JAN 23 2001
CLERK

No. 00-792

IN THE

Supreme Court of the United States

ANTONIA J.H. ELKINS

Petitioner

v.

PHARMACY CORPORATION OF AMERICA, and KEITH ANDERSON

Respondents

On Petition for Writ of Certiorari
to the U.S. Court of Appeals for the Fourth Circuit

REPLY TO BRIEF IN OPPOSITION

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Rebuttal to Respondents' Counter-Statement of the Case

The Respondents, Pharmacy Corporation of America, Inc. (hereinafter "PCA") and Keith Anderson (hereinafter "Anderson") center their opposition to Petitioner's brief on the allegations in Part C of their brief titled "Sup. Ct. Rule 15.2 Petitioner's Misstatements of Law and Facts" (Brief in Opposition, p. 6) and claim incorrectly that "The Petition is replete with misleading representations of the facts in the record, which prevents this Court from assessing the propriety of the decisions of the lower courts." Petitioner (hereinafter, "Ms. Elkins") categorically denies making any misstatements in her recital of the facts, but would note that Respondents' brief serves to highlight Ms. Elkins's claim that dismissal under Rule 56 was improper. Every fact claimed by Ms. Elkins is supported by admissible evidence. Respondents' recital of her "misstatements" of the facts is disingenuous at best. For all their outrage at Ms. Elkins's recital of the facts, Respondents present not a single exhibit to this Court in rebuttal of her facts.

Discussion

The Respondents have attempted to characterize this case as merely a sexual harassment case, and argue that under the EEOC guidelines and pertinent case law, it cannot succeed because there was only one sexual incident, and therefore by definition there could not have been a hostile work environment. Respondents minimize the one incident they concede to have occurred (Anderson's invitation to Hooters) asserting in the carefully crafted words of Human Resources Director James W. Brennan (hereinafter "Brennan")

that "the invitation was made in jest among kidding going on among all parties" (Petition, p. 3n - one can only wonder where Brennan got *that* characterization from - none of the people present ever described it that way).

In contrast, Ms. Elkins states that she protested what she perceived as an inappropriate invitation, stating forthrightly to Anderson as well as to Stevens that it could be viewed as sexual harassment, that he flushed with embarrassment at her refusal and her strong words, and that thereafter his attitude toward her changed radically - that in retaliation he undertook a course of mistreatment which led to her involuntary resignation and subsequent termination. The question is not a simple matter of whether Anderson's invitation to Hooters constituted sexual harassment; it is whether Ms. Elkins engaged in a protected activity by, in emphatically refusing the invitation, explicitly protesting it as such. It is not whether the subsequent treatment of her was intolerable if it did not involve sex-linked harassment per se, but whether she was singled out for retaliatory treatment that could be linked to her protest and amounted to constructive discharge. Whether any sexual harassment actually occurred is irrelevant to this case beyond that his anger at the charge was what motivated Anderson's subsequent conduct.

The Respondents contend that Ms. Elkins misstates the facts in claiming she availed herself of the company's grievance procedure. Ms. Elkins replies that the first step in the procedure was to protest to the immediate supervisor, that Anderson was not only her

immediate supervisor but the highest level of supervision at PCA's Beltsville facility, and that by company policy if the problem appeared to be resolved, there was no requirement to go further. In giving notice of her resignation, she characterized the Hooters incident as sexual harassment, and charged Anderson with retaliation. When she was contacted by Brennan, she discussed fully her reasons for tendering her resignation. Before accepting Ms. Elkins's resignation, Brennan promised an investigation. In fact, he discussed with Corporate Counsel whether a possible complaint of sexual harassment on the part of Ms. Elkins was likely to succeed, as evidenced by Respondents' own exhibit (as may be inferred from an extensively edited version of Brennan's letter to Ms. Elkins, the unedited version of which was provided in her petition as Appendix N) and the interview with Janet Rutkowski, PCA regional vice-president. Ms. Elkins introduced nothing new in observing that PCA didn't meet its duty to protect her against sexual harassment and retaliation, and in fact assisted in her termination. Throughout the whole relationship, PCA has been far more concerned with limiting its legal liability and insulating itself from suit (Ms. Elkins was not even contacted for any rebuttal of Anderson's and Stevens's statements about her).

The Respondents are at pains to emphasize that Ms. Elkins was an at-will employee (the consequence of a form clause) and hence has no grounds on which to pursue her allegations of breach of contract, abusive discharge or tortious interference with contract, since she resigned "voluntarily" (belied by virtually every word of her notice of resignation). However, the

Pharmacy Manager at Beltsville who hired Ms. Elkins, Barry Roberts, certainly must have been delegated the authority to make her a formal, written offer of certain specific terms and conditions of employment, which she accepted in writing; Anderson, who succeeded Mr. Roberts before Ms. Elkins actually began her employment on July 8, 1996, explicitly confirmed the agreement at a meeting with her. Ms. Elkins made no "misstatement" concerning the terms of what both she and PCA's authorized agent regarded as a contract. She states she was well aware that the job involved travel, and that at least once a month there would be "overnights" at two or three-day training sessions: she elicited PCA's agreement that THEREFORE she could work from home, on call to the Beltsville facility, with freedom to set her own schedule, in order TO AVOID GOING TO BELTSVILLE DAILY and have as much time as possible with her two young boys, then 8 and 3 years of age. To this end, she was provided all the modern electronic equipment necessary to keep in close touch with supervision; and in fact there was actually no office space for Ms. Elkins at Beltsville. HAD SHE NOT BEEN ASSURED OF THE ABILITY TO DO A GREAT DEAL OF WORK AT HOME, MS. ELKINS WOULD NOT HAVE ACCEPTED THIS JOB. In return, Petitioner was expected to create and maintain good rapport with the Directors of Nursing (hereinafter "DONs") at 23 nursing homes served by PCA, provide desired IV training to nursing staffs, and increase sales of IV equipment - her continued employment was explicitly conditioned on good performance in these areas. The record shows that in the three months she worked for PCA, Ms. Elkins traveled extensively, conducted many seminars, and

routinely worked well in excess of 40 hours per week. She did not object to being on call for necessary visits to the Beltsville facility, though it was an hour's drive from her home, and routinely went there to attend meetings.

Ms. Elkins objected to lengthy unnecessary visits to Beltsville. When ultimately, Anderson put her on notice that he meant to call her into the office with increasing frequency - daily if he wished, it was a major change in the terms of her employment. Ms. Elkins believes that by these means he fully intended to willfully disrupt her preparation for the training sessions on which the Directors of Nursing (DONs) would evaluate her performance.

Ms. Elkins had always fully accepted travel as an integral part of the job: she objected to Anderson's decision, conveyed to her in a telephone conversation of October 18, 1996, that she would thereafter no longer be allowed to count hours spent in necessary travel ("drive time") toward the 40-50 hours of work that PCA required as a minimum every week - thus radically extending her hours of work. Ms. Elkins informally canvassed other exempt employees (as she discussed in her sworn answers to Defendants' interrogatories) and learned that no one else had ever been treated thus (and the same is confirmed by the depositions of Anderson and Stevens). PCA hasn't denied that Anderson told Ms. Elkins that she couldn't count "drive time," nor did they tell Anderson he couldn't treat her that way - they simply insist that it didn't matter.

Respondents again allege, as they have before, that Ms. Elkins, as a salaried employee exempt from wage and hour laws, was not required "to work a set period of time to be entitled to her salary, *provided she accomplished her job duties*. At no time while Elkins was employed by PCA was her compensation reduced or in any way modified because she worked less than forty (40) hours in a workweek." (Opposition, p. 2., emphasis added.) Clever language, but it does not speak to the future - up to October 18, 1996, Petitioner had never worked less than 40 hours in a week, including "drive time." There is plenty in the record to indicate that PCA would not have tolerated a diminution in the number of hours reported as worked: the paper Petitioner signed at hire acknowledging her obligation to work at least 40 hours per week (Petition, Appendix K); the Stevens deposition in which she cited the expectation as more like 50; the notes of Human Resources Director Brennan's investigation into Petitioner's allegations in which Anderson is quoted as telling Stevens that Petitioner did not want to work over 40 hours (Petition, Appendix P, wherein Brennan notes that Anderson commented that Ms. Elkins "insists on working *only* 40 hrs," emphasis added - obviously it may be inferred that to work less would be unacceptable).

Respondents claim that Ms. Elkins "misstates the facts" when she *argues* that others were given the information they needed (Opposition, p. 7), but not she, and state that "nothing in the record supports this statement." It is in the record that Ms. Elkins was not told by Anderson of requests by her clients (enteral quality assurance, three-day courses), that other "on-

call" employees made statements that Anderson was an effective supervisor and made efficient use of his employees time, that Anderson *interfered* with Ms. Elkins's efficient use of *her* time, that other employees were told of meeting locations and meeting cancellations when Ms. Elkins was not, that Anderson wanted Ms. Elkins to conduct training, even after her letter of resignation, but that he chose to fire her on the spot when he discovered that (due to his own acts) she did not have the materials to conduct the training. The record is *voluminous* and contains many more documents and statements and interviews than simply the depositions of Susan Stevens (the single person, by the way, other than Anderson, whose motives for truthfulness should be most suspect) and Janice Rutkowski, and it is dishonest of Respondents to represent to this court that Ms. Elkins has "blatantly" misstated the facts (Opposition, p. 7).

The sheer number of such incidents in a matter of weeks would make most reasonable people suspicious, but the capping incident occurred when regional Nurse Consultant Carl Prince angrily disrupted Petitioner's presentation to a meeting of 20 DONs on October 17, 1996, by stating that he wanted only three-day training seminars, and had told PCA so; why therefore was Elkins offering anything else? The person he had to have told at PCA was Anderson; Anderson had clearly not told Petitioner. This was more than a mere passing "embarrassment." Prince conveyed indelibly to the DONs the totally incorrect impression that Ms. Elkins was stubbornly refusing to provide three-day sessions, when in fact she thought that three-day sessions were preferable for distant

nursing homes such as his. Ms. Elkins's reputation was compromised with 20 very important people, only a few of whom she had as yet met, upon whose evaluation of her services her continuance with the company would depend. It is utterly erroneous for the lower courts to have judged this episode, in particular, as a "trivial incident endemic to employment." It was part of a pattern.

Was There "An Ultimate Employment Action" Taken Against Ms. Elkins?

PCA characterizes Ms. Elkins's allegation that she had indeed been terminated by PCA and not merely constructively discharged (contrary to the finding of the lower courts that "no ultimate employment action had taken place") as an attempt to "provide the Court with the requisite 'ultimate employment action' taken against her" by drawing "an inappropriate conclusion from a misleading statement of the facts," further describing these inferences as "unreasonable" and "far-reaching."

The inferences which Ms. Elkins drew from the events which followed her giving notice of her intended resignation are entirely reasonable. Ms. Elkins has never left a job without giving adequate notice to an employer; in this case, she expected to conduct two training seminars already scheduled. At the time she went to give the first of these seminars, she had not been told whether or not her resignation had been accepted; she thought consideration of it was pending in Human Resources. When she arrived at the nursing home to find no one expected her and that the materials she needed for the seminar had not been sent

from Beltsville, she called Anderson to clarify her status. He terminated her employment on the spot.

One may also infer that Anderson had set the stage for an eventual termination for cause in case Ms. Elkins didn't resign at once on October 18, when he announced his intention to disrupt her work schedule at his pleasure (in effect withdrawing the right to work at home) and lengthened her work hours by withdrawing the universal privilege of counting travel time as work time. Since he had previously set up three situations which he knew would cause Directors of Nursing to develop hostility to her or a lack of confidence in her, Ms. Elkins could anticipate more of the same - enabling him to state in her next evaluation that she had failed to correct the areas of deficiency he had speciously noted in her first evaluation (touted by PCA as showing no bias against Petitioner because he had rated her "above average").

Why the Writ Should be Granted

It is the primary duty of the lower courts to do justice, not merely expedite it in order to concentrate on the most significant or clear-cut cases. Familiar and useful paradigms can frustrate justice through careless application - or misapplication. Rule 56 sweeps a lot of cases out of the justice system - great care should be used in its exercise. Particularly critical is use of the "reasonable person." Why couldn't Ms. Elkins win on a constructive termination charge? Because a reasonable person, in the eyes of the trial judge, wouldn't have quit for the reasons advanced by Ms. Elkins. If Ms. Elkins's supervisor had made it a condition of continued employment that she consent to

have intercourse with him even once, she would have a case. Why should she have to tolerate something even more serious - the demand that she place her children's welfare at risk? Why shouldn't she be seen as forced to quit when told she must curtail her maternal contact with her three year old baby to keep a job that was becoming a mine-field of traps laid by her supervisor? She did not voluntarily leave - she loved the work. Was Anderson's action gender based? Emphatically yes.

Ms. Elkins prays that this court remand the case for a jury trial, or in the alternative issue a writ of certiorari to review the lower courts' decisions.

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